IN THE

Supreme Court of the United States

October Term, 1974

AUG 22 1974
MICHAEL RODAK, JR., CLERK

No. 74-157

UNITED HOUSING FOUNDATION, INC. *et al.*,
Petitioners,

v.

MILTON FORMAN and ELLEN FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,
Additional Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
Attorney for Petitioners

MARTIN LONDON
GEORGE P. FELLEMAN
ALAN G. BLUMBERG
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	3
Jurisdiction of This Court	3
Question Presented	3
Statutes and Rule Involved	4
Statement of the Case	4
Reasons for Granting Certiorari	11
I.—The question whether residents' interests in housing cooperatives and condominiums are "securities" under the 1933 Securities Act and the 1934 Securities Exchange Act is an important question of federal law which has not been, and should be, settled by this Court	12
II.—The literal statutory construction adopted by the Court of Appeals defies congressional intent and conflicts with the decisions of other Courts of Appeals	17
III.—The decision that residential property which is incapable of producing profit can nevertheless be a "security" undermines the long-established definition of "investment contract	20
IV.—The Court of Appeals decision conflicts with guidelines issued by the Securities and Exchange Commission	24
Conclusion	27

PAGE

TABLE OF AUTHORITIES

Cases:

Bellah v. First National Bank of Hereford, Tex., 495 F.2d 1109 (5th Cir. 1974) 20

Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945), aff'd 326 U.S. 404 (1945) 18
CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961) 18
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 18
Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), cert. den. 391 U.S. 905 (1968) 22

Forman v. United Housing Foundation, Inc., No. 73-2613 (2d Cir. June 12, 1974) 2, 3, 10-11, 17, 20, 23, 24, 26, A1
Forman v. United Housing Foundation, Inc., 366 F. Supp. 1117 (S.D.N.Y. 1973) 3, 5, 8-10, 15, 22-23, B1

Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cir. 1974) 22

Hanks v. Urstadt, 37 A.D.2d 1064 (1st Dep't 1971) 15

Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974) 16

Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973) 19, 20

McClure v. First National Bank of Lubbock, Tex F.2d 490 (5th Cir. 1974) 20

Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093 (5th Cir. 1973), cert. den. —— U.S. —— (1974) 22

PAGE

People v. Cadplaz Sponsors, 69 Misc.2d 417 (Sup. Ct. N.Y. Co. 1972) 15

Ryan v. J. Walter Thompson Co., 453 F.2d 444 (2d Cir. 1971), cert. den. 406 U.S. 907 (1972) 16

Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir. 1972), cert. den. 409 U.S. 1009 (1974) 20
SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) 12, 21
SEC v. Continental Commodities Corp., No. 73-2429 (5th Cir. July 17, 1974) 20
SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973), cert. den. 414 U.S. 821 (1973) 22
SEC v. Haffenden-Rimar International, Inc., 496 F.2d 1192 (4th Cir. 1974), aff'g 362 F. Supp. 323 (E.D. Va. 1973) 22
SEC v. Koscot Interplanetary, Inc., No. 73-2339 (5th Cir. July 15, 1974) 22
SEC v. W. J. Howey Co., 328 U.S. 293 (1946) 9, 12, 21, 24, 26
Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941) 19

Tcherepnin v. Knight, 389 U.S. 332 (1967) 12, 18, 21
1050 Tenants Corp. v. Jakobson, No. 74-1023 (2d Cir. July 8, 1974) 11, 14

United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) 19

Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973) 20

Wilko v. Swan, 346 U.S. 427 (1953) 16

Constitutional Provision, Statutes and Regulations:

	PAGE
U.S. Const. Amend. XI	16
National Housing Act §§213, 221(d)(3), 221(j), 236 (12 U.S.C. §§1715e, 1715*l*(d)(3), 1715*l*(j), 1715z-1	13
15 U.S.C. §77b(1)	12, 17, 18, D1
15 U.S.C. §77q(a)	4, D1-2
15 U.S.C. §77v(a)	4, D2-3
15 U.S.C. §78c(a)(10)	12, 17, 18, D3
15 U.S.C. §78j(b)	4, D4
15 U.S.C. §78aa	4, D4-5
28 U.S.C. §1254(1)	3
28 U.S.C. §1331	6
28 U.S.C. §1343	6
42 U.S.C. §§1521 et seq. (Lanham Act)	13
42 U.S.C. §1983	6
Ill. Stat. Ann. ch.67½, §§1 et seq., 53 et seq.	14
Mass. Gen. L. ch. 23A App., §§1-1 et seq.	14
Mich. Stat. Ann. §§16.114 et seq.	14
N.J. Stat. Ann. §§55:14J-1 et seq.	14
N.Y. Private Housing Finance Law §§10-59	5
N.Y. Private Housing Finance Law §11	23
N.Y. Private Housing Finance Law §11-a	5, 15, 23
N.Y. Private Housing Finance Law §12(5)	11
N.Y. Private Housing Finance Law §22	5
N.Y. Private Housing Finance Law §32	15
N.Y. Private Housing Finance Law §33	5
N.Y. Private Housing Finance Law §43(1)	6
35 Penn. Stat. Ann. §§1680.101 et seq.	14
F.R.C.P. 12(b)(1)	8
17 C.F.R. §240.10b-5	4, 16, D5
SEC Securities Act Release No. 33-5347 (1973)	16, 24-26, D5-11

Bills and Legislative Material:

	PAGE
Building The American City, Report of the National Commission on Urban Problems to Congress and the President, H.R. Doc. 91-34, 91st Cong., 1st Sess. (1968)	6, 15
H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934)	18, 19
Report of the Real Estate Advisory Committee to the Securities and Exchange Commission (October 12, 1972)	24
S. 3066, 93d Cong., 2d Sess. (1974)	19
S. Rep. No. 792, 73d Cong., 2d Sess. (1934)	18, 19
S. Rep. No. 93-693, 93d Cong., 2d Sess. (1974)	15

Articles:

CCH Fed. Sec. L. Rep., No. 539, p. 2 (6/19/74)	13
Frome, Buying & Selling Securities: Cooperative Apartments and the Securities Laws, 172 N.Y.L.J. No. 1, p. 1 (7/1/74) and 172 N.Y.L.J. No. 25, p. 1 (8/15/74)	13
Heckman, Misplaced Criticism Threatens 'Condos', New York Times, July 21, 1974, §8 at p. 1	13
2 Housing & Dev. Rep. 110 (1974)	13
Mortgage & Real Estate Executives Rep., Vol. 7, No. 10, p. 1 (7/15/74)	13
171 N.Y.L.J. No. 115, p. 1 (6/14/74)	13
P-H Sec. Reg. Guide, Sec. Reg. Rep., Vol. 40, No. 1, p. 2 (12/27/73)	13
43 U.S.L.W. 2004 (1974)	13

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN and ELLEN FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,
Additional Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners United Housing Foundation, Inc., Community Services, Inc., Harold Ostroff, Robert Szold, Milton Altman, George Schecter, Anthony Marino, Paul Kramer, Irving Alter and Julius Goldberg respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which reversed a judgment of the United States District Court for the Southern District of New York.*

In addition to Milton and Ellen Forman, the respondents are Earle and Patricia McField; Michael and Phyllis Sicilian; Jack and Diane R. Blackin; Carl and Alma Trost; Robert and Pauline

[*footnote continued on next page*]

In an unprecedented decision, the Second Circuit has held that a membership in a nonprofit cooperative housing corporation which is state-financed and regulated, and with respect to which profit incentives are totally absent, is a "security," as defined in the Securities Act of 1933 and the Securities Exchange Act of 1934. In rendering that startling decision, the Court of Appeals has superimposed federal jurisdiction and regulation upon an already complex state social welfare program available exclusively to low and middle income residents of the state. At the same time, it has geometrically expanded federal securities law jurisdiction to include residential interests in all cooperative and condominium housing.

The decision promises to have a staggering impact on the growing number of government sponsored low and middle income housing programs. It has (i) construed the statutes at issue in a manner expressly rejected by other Circuit Courts; (ii) without Congressional sanction, created an entirely new class of federal litigants by applying statutes enacted to regulate conduct in the investment marketplace to the sales and purchase of residences; (iii) undermined the definition of an "investment contract" established by this Court nearly thirty years ago; and (iv) created troublesome conflicts with published guidelines of the Securities and Exchange Commission.

Carrington; Gilbert and Gloria Narins; Murray and Helene Victor; Jerome and Leonore Baer; Harold Asnin; Joseph S. and Wanda D. O'Connor; Abraham and Irene Kopolsky; Richard Ferguson; Hyman and Beatrice Fertel; Herman and Myra Ackerman; Bernard and Victoria Seinfeld; Frank and Hilda Glassman; Walter Simon; Thomas D. and Elsa A. MacLean; Melvyn and Gloria Plotzker; Gary and Charlotte Stern; Max and Bettina Schwarzhaupt; Herman B. and Rose Goldberg; Stephen and Juanita Reynolds; Arthur and Gertrude Lucker; Abraham and Henriette Schenck; Reginald and Zenobia Thomas; John, Jr., and Elissa Pyatt; Albert L. and Rhoda Abrams; Jack and Pearl Handschuh, individually and on behalf of themselves and all others similarly situated, and in the right of Riverbay Corporation.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is set forth in Appendix A.* The opinion of the District Court is reported at 366 F.Supp. 1117 (S.D.N.Y. 1973) and is set forth in Appendix B.

Jurisdiction of This Court

The judgment sought to be reviewed was entered on June 12, 1974 and is set forth in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Is a membership in a cooperative housing corporation, to which neither the promise, the expectation nor the possibility of profit attaches, a "security" within the ambit of the Securities Act of 1933 and the Securities and Exchange Act of 1934, particularly when it arises out of the following circumstances:

1. A state legislature determines, as a matter of social policy, to take state action to remedy a serious housing shortage for low and middle income groups, and adopts legislation to encourage the construction of low and middle income housing by furnishing substantial subsidies;

* References to the appendices are prefaced with the appendix letter followed by the page number, *e.g.* (A15).

2. Under that legislation, a nonprofit foundation composed of labor unions, housing cooperatives and civic groups sponsors a massive nonprofit cooperative housing development, the planning, construction and initial management of which is pervasively controlled by the state in accordance with the statutory scheme;

3. Membership in the cooperative corporation

(a) is purchased solely in order to secure a personal residence;

(b) is accompanied neither by promise of profit by the seller nor expectation of profit by the buyer;

(c) can be resold only when the member moves out and only for exactly the price paid; and

(d) is evidenced by two instruments: (i) a lease entitling the member to occupy a specific apartment, and (ii) a certificate called "stock" which reflects the member's participation in the residential cooperative corporation?

Statutes and Rule Involved

This case involves Sections 17(a) and 22(a) of the Securities Act of 1933, 15 U.S.C. §§77q(a) and 77v(a); Sections 10(b) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78aa; and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. 240.10b-5, the texts of which are set forth in pertinent part in Appendix D.

Statement of the Case

Co-op City, the largest cooperative housing development in the United States, is a low and middle income project financed and built between 1965 and 1972 under New York's

pioneering Private Housing Finance Law (the "Housing Law").* The project was made possible through substantial government subsidies, primarily in the form of low interest mortgage loans provided by the New York State Housing Finance Agency and real estate tax abatements provided by the City of New York.**

The respondents, plaintiffs below, are 57 residents of Co-op City.† They have sued representatively in behalf of the resident-owners of all of Co-op City's 15,372 apartments, and derivatively in behalf of Riverbay Corporation, a nonprofit, mutual housing company organized under the Housing Law to own and operate Co-op City.

Respondents instituted this action against the petitioners (and additional respondents the State of New York and the New York State Housing Finance Agency) in the United States District Court for the Southern District of New York, seeking reduction of their monthly rentals or "carrying charges," money damages and other relief. Federal jurisdiction was based on two claims alleging violations of the federal securities laws. In essence, the complaint charges that "Information Bulletins" distributed to prospective cooperative members misstated and omitted

---

* N. Y. Private Housing Finance Law §§10-59. Unless otherwise indicated, the facts recited are those found by the District Court as set forth in its opinion. That opinion is printed in full in Appendix B hereto.

** See Housing Law §§11-a(2-a), 22, 33.

† Additional respondents the State of New York and the New York State Housing Finance Agency were defendants-appellees below, and are named as respondents herein only because their motion for reargument is still *sub judice* in the Court of Appeals. Should that motion be denied, we are advised that they intend promptly to file a petition for a writ of certiorari with this Court.

material facts with respect to construction costs and monthly carrying charges which members of the cooperative would be required to pay. Additionally, ten state-law claims are joined in the complaint under the doctrine of pendent jurisdiction.*

Petitioner United Housing Foundation, Inc. ("UHF"), the sponsor of the Co-op City project, is a nonprofit corporation composed of labor unions, housing cooperatives and other civic groups. It is widely regarded as a leader and pioneer in the development of "consumer-oriented housing cooperatives."** Petitioner Community Services, Inc. ("CSI"), is the "service arm"—the general contractor and sales agent—of UHF. Organized under New York's Business Corporation Law, it is a wholly-owned subsidiary of UHF. The individual petitioners are some of the officers and directors of UHF, CSI and Riverbay.

Additional respondent The New York State Housing Finance Agency ("Agency") is a corporate governmental agency of the State.† It furnished a long-term, low interest mortgage loan to Riverbay Corporation financed through a public issue of tax exempt bonds. Additional respondent The State of New York ("State"), through its Division of Housing and Community Renewal, has supervised and controlled virtually every aspect of the planning, construction, promotion and operation of Co-op City.

---

* An additional federal claim was asserted under the Civil Rights Act, 42 U.S.C. §1983, and 28 U.S.C. §§1331, 1343, solely against the New York State Housing Finance Agency.

** *Cf.* Building The American City, Report of Natl. Commn. on Urban Problems to Congress and the President, H.R. Doc. 91-34, 91st Cong. 1st Sess. 136-39 (1968).

† Housing Law §43(1).

The Cooperative Memberships

Like thousands of housing cooperatives in the United States, Co-op City is organized as a corporation (Riverbay), but for a public, not a private purpose. Riverbay's cooperative members subscribe to instruments formally denominated "stock," but those instruments, in essence, bear little similarity to conventional stock and other forms of securities found in the investment and business communities.

1. Cooperative members purchase their "stock" (at the rate of $450 per room) *solely* in order to enjoy the right to occupy a Co-op City apartment. All of their rights and obligations as occupants are set forth in occupancy agreements (leases) entered into at the time of purchase. The acquisition of "stock," which does not provide the possibility of dividends or appreciation in value, is incidental. It has no independent significance or meaning.

2. Cooperative members can sell their "stock" only when they vacate their apartments and only for the price they have originally paid.

3. All those who have asked to withdraw from the cooperative, whether prior to or after occupancy of their apartments, have done so, and have received refund of their purchase price in full.

4. The cooperative members are the beneficiaries of substantial State and City subsidies designed to reduce the monthly costs of occupancy to below-market levels. These subsidies are in the form of long-term, low-interest mortgage loans from the Agency covering more than 90% of the project cost, and a real estate tax abatement from

the City of New York which reduces the annual taxes which would otherwise be assessed against the project by approximately 80%.

5. Eligibility for cooperative membership is limited by law to low and middle income persons. The prospective cooperative members are fully advised that the cooperative is a nonprofit mutual housing company organized under the provisions of the Housing Law, and will not earn any profits or pay them any income. They are not induced to purchase by any promise of, nor do they expect any, profit, gain or other financial reward.

6. Phrases commonly used in promoting sales of securities or other investments are conspicuously absent from the bulletins and other documents furnished to prospective members.*

Proceedings Below

Petitioners moved in the District Court, prior to answer, for an order pursuant to F.R.C.P. 12(b)(1) dismissing the complaint for lack of subject matter jurisdiction, on the ground that the cooperative interests purchased by the

* In their place are descriptions such as the following:

"The purpose of a cooperative is to provide home ownership not just apartments to rent. The community is designed to provide a favorable environment for family and community living. If you have lived in a private apartment house you were the tenant and someone else the landlord. The landlord's interest was in financial gain. There was no common interest between the tenants. You may have lived in the same apartment for years without getting to know your neighbors.

"The common bond of collective ownership which you share makes living in a cooperative different. It is a community of neighbors. Home ownership, common interests and the community atmosphere make living in a cooperative like living in a small town." p. 166a of Appendix in Court below.

respondents were not "securities" within the meaning of the federal securities laws.*

The District Court granted the motion and dismissed the complaint in its entirety. Initially finding that the mere label "stock" is not determinative of whether an instrument is a "security,"** the Court held that the "essential characteristics" of Co-op City's unusual shares made them something other than conventional stock. The District Court also held that, because of their fundamental nonprofit nature, Riverbay's cooperative shares were not "investment contracts" as defined by federal law.† On this point, the District Court noted:

> ". . . none of the documents involved in this transaction . . . ever, once use material, tangible profits as an inducement . . . [and] it is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce. These shares are incapable—by law and by-law—of producing any monetary or fungible return." (B21-22)

And, with respect to respondents' argument that the cooperative members' expectations of below-market housing costs furnished the "profit" motive necessary to bring

* That motion was joined in by the State and Agency, which also raised the issue of sovereign immunity.

** "[T]his Court must, at a minimum, look through the name of an instrument to its essential characteristics . . ." (B17).

† Both Courts below relied upon the definition of "investment contract" set forth in *S.E.C.* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946), namely, ". . . a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ."

the transactions within the scope of federal law, the District Court held:

> "... it seems certain that Congress never intended to stretch the scope of the securities acts outside the commercial world and its fungible values, to the uncharted and unchartable realm of intangible, elusive personal valuables where one man's balm may very well be another's bane.
>
> * * *
>
> "Congress did not intend to sweep into the ambit of the federal securities laws, state-encouraged, nonprofit transactions made pursuant to a state emergency housing law and available only to state residents . . . ." (B26-28).

In short, the District Court held that Co-op City—a public welfare program and not an investment venture—was wholly outside the scope of the federal securities laws. (B28).

The Court of Appeals reversed. Adopting a "literal approach," it held that—regardless of context or purpose—any instrument which is labelled "stock" is within the coverage of the securities laws. It alternatively held that Riverbay shares were "investment contracts." While it conceded that "there is no possible profit on a resale of the stock," the Court found elements of "profit" of a type never before considered in any of the cases decided under the federal securities laws: it held that Co-op City's shares offer the possibility of "profit" to its members because (a) income from leased commercial space might reduce cooperative members' monthly rentals;* (b) personal income

* This includes the leasing of professional offices and retail establishments such as grocery stores; renting parking spaces; and income from laundry room facilities. The figures cited by the Court

[*footnote continued on next page*]

tax deductions of mortgage interest payments and real estate taxes may be taken by cooperative members; and (c) Co-op City housing costs substantially less than equivalent housing on the open market.

Accordingly, the Court of Appeals remanded the case to the District Court as to all defendants and held that the shares of this nonprofit, government subsidized and regulated cooperative housing project were "securities" within the meaning of the federal securities laws.**

Reasons for Granting Certiorari

1. The Court of Appeals' unprecedented decision raises issues of urgent national importance. The decision will affect hundreds of thousands of government regulated cooperative apartments throughout the nation as well as state and local programs designed to stimulate such housing. It will have a direct and substantial impact on all group-owned housing units—both cooperative and condominium (numbering in the millions). It extends federal jurisdiction into a wholly new field and creates a substantial new class of federal litigants without congressional sanction.

---

of Appeals (A16) are gross, not net, figures, and do not reflect the costs of maintaining these facilities. Moreover, it is undisputed that Co-op City's incidental commercial facilities were constructed solely in order to service Co-op City's enormous population. Indeed, under the Housing Law, the construction of commercial facilities in a cooperative project is limited to those which are "incidental and appurtenant" to the project. Housing Law §12(5).

** Only four weeks later, the Court of Appeals relied on the instant decision in holding that shares in a privately owned "Park Avenue" residential cooperative were securities within the meaning of the federal securities laws. *1050 Tenants Corp.* v. *Jakobson*, No. 74-1023 (2d Cir. July 8, 1974).

2. The decision is contrary to the purpose and intent of the statutes and conflicts with the decisions of other Courts of Appeals, which have rejected literal application of the definitional sections of the 1933 and 1934 Acts adopted by the Court in this case.

3. The decision undermines the well-established definition of "investment contract" settled in three decisions of this Court,* as well as in scores of Circuit Court decisions, all of which held that the inducement and expectation of "profit," as that word is generally used in commerce, is an indispensable element of every "investment contract" subject to the federal securities laws.

4. The Court's expansive definition of "profit" necessary to the existence of an "investment contract," to include the hope of realizing a saving in living expenses, conflicts with guidelines promulgated by the Securities and Exchange Commission in connection with condominiums and cooperatives. Moreover, that definition is fundamentally unsound and will inevitably lead lower courts farther afield from the kinds of instruments intended to be covered by the securities laws.

I. The question whether residents' interests in housing cooperatives and condominiums are "securities" under the 1933 Securities Act and the 1934 Securities Exchange Act is an important question of federal law which has not been, and should be, settled by this Court.

The decision below does not rest on narrow grounds, applicable only to a government-subsidized and regulated housing cooperative such as Co-op City. It is a sweeping

* *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *SEC* v. *W.J. Howey Co., supra; Tcherepnin* v. *Knight*, 389 U.S. 332 (1967).

decision (a) applicable to all housing cooperatives, and (b) apparently applicable to all residential condominiums and other forms of jointly owned housing as well. It has evoked considerable comment, attention and criticism in the legal profession.* Review by this Court is called for because of the striking impact the decision will have on the nation's housing as well as on the federal judiciary and the administration of the federal securities laws.

The Scope of the Decision

This is the first decision, as far as we can discover, in which transactions by resident owners in the purchase or sale of residences have been held subject to suit in federal courts under the federal securities laws. Its impact will be immediate and sweeping.

It will subject to the federal securities laws transactions in the shares of hundreds of thousands of existing government-subsidized or supported cooperatives. These include cooperatives built or converted under the National Housing Act, §§213, 221(d)(3), 221(j) and 236, and defense housing under the Lanham Act, 42 U.S.C. §§1521 *et seq.* It includes approximately 100,000 cooperative residences in New York State alone built or converted under City and State subsidized programs. In addition, cooperative housing develop-

* Mortgage & Real Estate Executives Rep., Vol. 7, No. 10, p. 1 (7/15/74); CCH Fed. Sec. L. Rep., No. 539, p. 2 (6/19/74); 43 U.S.L.W. 2004; 171 N.Y.L.J. No. 115, p. 1 (6/14/74); Frome, "Buying & Selling Securities: Cooperative Apartments and the Securities Laws" 172 N.Y.L.J. No. 1, p. 1 (7/1/74) and 172 N.Y. L.J. No. 25, p. 1 (8/5/74); 2 Housing & Dev. Rep. 110; P-H Sec. Reg. Guide, Sec. Reg. Rep. Bulletin, Vol. 40, No. 1, p. 2 (12/27/73, commenting on District Court decision).

ments built pursuant to housing programs adopted by other states will be affected. Some states having such programs are: Illinois (Ill. Ann. Stat. ch. 67-½, §§1 *et seq.*, 153 *et seq.*); Massachusetts (Mass. Gen. L. ch. 23A App., §§1-1 *et seq.*); Michigan (Mich. Stat. Ann. §§16.114 *et seq.*); New Jersey (N.J. Stat. Ann. §§55:14J-1 *et seq.*); Pennsylvania (35 Penn. Stat. Ann. §§1680.101 *et seq.*). The decision, moreover, is not limited to government sponsored, financed and/or regulated housing cooperatives. It applies to all private cooperatives.* Furthermore, although the decision does not mention condominium developments, the Court's reasons for holding that membership in a housing cooperative is an "investment contract" and therefore a "security" apply equally to condominiums.**

---

* This was made clear in the recent decision in *1050 Tenants Corp.* v. *Jakobson, supra,* in which the Second Circuit held shares in a private cooperative "securities" principally on the authority of this decision.

** The elements of "profit" found determinative by the Court below are present to exactly the same extent and degree in condominiums:

a. The owners of condominium units are entitled to personal income tax deductions for real estate taxes and mortgage interest payments;

b. The owners of condominium units may find some of their expenses offset by income from rental of offices, stores or garages; and

c. The owners of condominium units may enjoy "below market housing costs" if their development receives government subsidies, as in the case of Co-op City, or alternatively, they may simply seek "optimum services at the lowest possible cost," if, as in the case of *1050 Park Avenue,* their development does not receive subsidies.

It is estimated that there are presently over two million residential housing condominium units in the United States. Heckman, Misplaced Criticism Threatens 'Condos,' New York Times, July 21, 1974, §8 at 1.

The Impact of the Decision

The impact of this decision to extend blanket application of the securities laws to purchases and sales of all group owned residential housing units—numbering in the millions —promises to be enormous.

1. The most significant impact will be felt by government subsidized and regulated cooperatives, such as Co-op City. Federal, state and local governments are responding to the critical need for low and middle income housing with innovative programs to encourage cooperative housing developments as alternatives to the traditional—and often unsuccessful—public housing project.* Clearly, however, the costs and uncertainties inherent in adding the web of federal securities laws to the already intricate network of applicable state laws and regulations in the area of government-subsidized housing will create a substantial impediment to further progress in this important field of national concern.** And, as in this case, application of the

---

* See Building the American City, *supra* at 141-142; S. Rep. No. 93-693, 93d Cong. 2d Sess. 38 (1974). And see Housing Law §11-a(2a), finding by the New York Legislature that cooperative ownership, with its "consequent pride and responsibility of ownership," would improve the quality of urban, "slum ghetto" life.

** Under the Housing Law, virtually every aspect of a cooperative's development and operation is regulated by the state (B6-7). The Commissioner of Housing has broad investigatory and hearing powers with respect to supervision of a cooperative's affairs. Housing Law §32(5). He may remove and replace a project's directors if they have violated the law, state regulations or a cooperative's certificate of incorporation, among others; he may also sue to enjoin such violations—or any act or omission "which is improvident or prejudicial to the interest of . . . the tenants . . . ." Housing Law §32(6)-(7).

In addition to the powers conferred on the Commissioner under the Housing Law, the State Attorney General can sanction and enjoin improper conduct. *People* v. *Cadplaz Sponsors,* 69 Misc. 2d 417 (Sup. Ct. N.Y. Co. 1972). Moreover, the matter of the increased Co-op City carrying charges has been litigated by some residents under available state court procedures. The state court found that the increases were reasonable and mandated by state law. *Hanks* v. *Urstadt,* 37 A.D.2d 1064 (1st Dep't 1971) (Mem.).

federal securities laws to state governments and state agencies, as defendants in the federal courts, raises serious questions of constitutional immunity and other related issues.*

2. Lawsuits arising out of disputes between purchasers and sellers of these residential interests will now be maintainable in federal courts without regard to amount in controversy, diversity of citizenship or the existence of a federal question. This not only includes actions arising out of initial offerings, but any actions arising out of privately negotiated resales, if the telephone or mails were utilized.**

3. Uncertainty as to whether or not registration statements must be filed will be heightened. This is particularly true for cooperative and condominium builders who have heretofore relied on Securities Act Release No. 33-5347 (D5-11) as their guideline for determining whether their units are "securities" requiring registration. Because the Court of Appeals' definition of "profit" conflicts with the definition of "profit" set forth in that Release, the question of registration has become hopelessly confused.

---

* The State and the Agency claimed immunity from suit in the federal courts under the Eleventh Amendment to the U. S. Constitution, and also claimed that they are not "persons" within the meaning of the 1934 Act.

** Moreover, it is to be expected that prospective plaintiffs who have even the slimmest chance of establishing a 10b-5 claim will sue in federal court and assert all of their other claims under the doctrine of pendent jurisdiction—a practice which was followed in this very case and which in earlier cases has generated criticism from the courts. *Ryan* v. *J. Walter Thompson Co.*, 453 F.2d 444, 445 (2d Cir. 1971), *cert. den.* 406 U.S. 907 (1972); *Kavit* v. *A. L. Stamm & Co.*, 491 F.2d 1176, 1178-79 (2d Cir. 1974). And, because of the rule established in *Wilko* v. *Swan*, 346 U.S. 427 (1953), agreements to arbitrate disputes arising out of the purchase or sale of cooperative or condominium residences will not be enforceable, thus adding to the prospective burden of federal court litigation that might be expected and further upsetting a traditional and encouraged manner of resolving such disputes.

II. The literal statutory construction adopted by the Court of Appeals defies congressional intent and conflicts with the decisions of other Courts of Appeals.

The decision below—which applies statutes designed to regulate transactions in the marketplace for investment and speculation to personal transactions involving purchases and sales of homes—is fundamentally inconsistent with the purpose and intent of the federal securities laws. Residential interests in housing cooperatives and condominiums are purchased primarily—and in the case of Co-op City exclusively—for use as personal residences. They are not sold or purchased for income or profit. They are not sold or purchased for speculative purposes.

The Court of Appeals, however, held that the use of the word "stock" in transactions in Co-op City cooperative memberships was sufficient to bring these transactions within the ambit of the federal securities laws:

> "* * * [T]he fact that 'stock' certificates are used in a 'stock' corporation is sufficient in itself to bring transactions in the 'stock' within the literal definition of the Acts." (A11).

This literal construction of the definition of "securities" covered by the 1933 and 1934 Acts is not only manifestly wrong, it defies common sense. It produces the anomalous result of extending the securities laws to a state supported and regulated, nonprofit public welfare housing program remote from the world of investment and speculation.

There is no need here to recite at length the well-known and often quoted legislative history of the 1933 and 1934 Acts. Their goals were to regulate conduct and instruments used in the investment marketplace. They sought

to curb unhealthy business practices—including excessive speculation and market manipulation—which had helped to precipitate the financial crises resulting in the depression.*

The statutes were not intended to apply to sales or purchases of residences. And they were not intended to be applied woodenly, without regard to context or economic reality. Indeed, the definitional sections of the statutes (which specifically enumerate various forms of "securities," including "stock," "bond," "debenture," etc.) are prefaced by the words "unless the context otherwise requires," thus suggesting that the context in which an instrument arises must be examined and that the context may not warrant a literal application of the words of the statutes. And, in *Tcherepnin* v. *Knight, supra,* this Court warned:

> ". . . [I]n searching for the meaning and scope of the word 'security' . . ., form should be disregarded for substance and the emphasis should be on economic reality . . ."** 389 U.S. at 336 (citation omitted).

Since "the context" of the instrument in question is of material significance (as evidenced in the statutes) and since "economic reality" is to govern (as stated by this Court in *Tcherepnin*), then the mechanical application of

* See generally H.R. Rep. No. 1383, 73rd Cong. 2d Sess. (1934); S. Rep. No. 792, 73rd Cong., 2d Sess. (1934).

** This Court has long spoken out against the literal application of statutory language. *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 458-59 (1892) ("a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"); *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316, 328 (1961), quoting Cook, *Logical and Legal Bases of the Conflict of Laws* ("[Literalism] has all the tenacity of original sin and must constantly be guarded against." In *Cabell* v. *Markham,* 148 F.2d 737, 739 (2d Cir. 1945), *aff'd* 326 U.S. 404 (1945), Judge Learned Hand wisely remarked that it is error "to make a fortress out of the dictionary."

the statutory language in this case was manifest error, particularly when its result is to extend federal law to a wholly new subject area which Congress has expressed no intention to regulate.* The creation of new areas of federal jurisdiction is the province of Congress and not the courts. As this Court noted in *United Steel Workers of America* v. *R. H. Bouligny, Inc.,* 382 U.S. 145, 150-51 (1965), "[P]leas" for the expansion of federal jurisdiction into "hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." See *Shamrock Oil and Gas Corp.* v. *Sheets,* 313 U.S. 100 (1941).

The Court's error in holding that all stock is a "security"** is highlighted by the contrary approaches recently adopted by the Third and Fifth Circuit Courts of Appeals. In *Lino* v. *City Investing Co.,* 487 F.2d 689 (3d Cir. 1973), the Court flatly rejected a wooden reading of the definitional sections of the 1933 and 1934 Acts and held the "note" at issue in that case not a security, even though the literal language of the statutes appears to identify all notes as securities. In rejecting a literal construction, the Court stated:

* The legislative history of the 1933 and 1934 Acts is silent as to coverage of transactions in personal residences. And legislation now pending in Congress to provide federal assistance for the development of cooperative housing, among other objects, nowhere acknowledges the applicability of the securities laws to cooperative memberships, but rather designates HUD as the agency to protect the "consumer interest." S. 3066, 93d Cong. 2d Sess., ch. I, §§401(d), 501(a)(1)(ii), 802(b) (1974).

** The Second Circuit's literal approach to the definition of "security" was recently reaffirmed in the case of *1050 Tenants Corp.* v. *Jakobson, supra,* in which the Court held a share of stock in a privately-owned cooperative to be a security under the federal securities laws. ("First, we ground our decision on what has been characterized as the 'literal approach' . . . .").

> "After considering the noted decisions and the arguments of both parties, it is our view that the legislation was not intended to cover the transaction which occurred here. All of the definitional sections involved in this case are introduced by the phrase 'unless the context otherwise requires.' The commercial context of this case requires a holding that the transaction did not involve a 'purchase' of securities." 487 F. 2d at 694.

And in *McClure* v. *First National Bank of Lubbock, Tex.*, 497 F.2d 490 (5th Cir. 1974), the Fifth Circuit refused to adopt the literal approach and held that a commercial promissory note made for business, not investment, purposes, was not a "security" within the meaning of the 1934 Act.*

III. The decision that residential property which is incapable of producing profit can nevertheless be a "security" undermines the long-established definition of "investment contract."

The Court of Appeals has held that a membership in a state subsidized and regulated nonprofit housing cooperative is an "investment contract" and thus a "security" subject to the federal securities laws. That unprecedented decision seriously undermines three decisions of this Court, as well as scores of Circuit Court decisions, which have firmly established profit as a necessary element of an "investment contract" under the securities laws.

* The Fifth Circuit relied on *Lino* and on its prior decision in *Bellah* v. *First National Bank of Hereford, Tex.*, 495 F.2d 1109 (5th Cir. 1974). See also *SEC* v. *Continental Commodities Corp.*, No. 73-2429 (5th Cir. July 17, 1974); *Vincent* v. *Moench*, 473 F.2d 430 (10th Cir. 1973); *Sanders* v. *John Nuveen & Co.*, 463 F.2d 1075 (7th Cir. 1972), *cert. den.* 409 U.S. 1009 (1974), refusing to apply a literal test to the "note" exemption of the 1934 Act.

This Court enunciated the controlling definition of an investment contract nearly thirty years ago in *SEC* v. *W. J. Howey Co., supra*:

> ". . . [A]n investment contract [is] . . . a contract, transaction or scheme whereby a person invests his money in a common enterprise and *is led to expect profits* solely from the efforts of a promoter or a third party . . . ." 328 U.S. at 298-99 (emphasis supplied).

"Profit" is thus a key element in an investment contract (indeed, in every security). Moreover, as this Court held in *Howey*, the inducement of profits held out to prospective purchasers is a critical factor in the finding of an investment contract.* Three years earlier, this Court in *SEC* v. *C. M. Joiner Leasing Corp., supra*, focused on the same element—the promise of substantial profits:

> "The test . . . is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." 320 U.S. at 352-53.

Indeed, in *Joiner*, the Court suggested that if the profit inducements had not been included in the offer, the interests being sold might not have been investment contracts (320 U.S. at 348).**

The promise of monetary profit on one's investment, the inducement of substantial financial return, is thus a central and indispensable element of every investment contract.

* It was noted that the purchasers "are attracted by the expectation of substantial profits. It was represented, for example, that profits during the 1943-1944 season amounted to 20% and that even greater profits might be expected during the 1944-1945 season . . . ." 328 U.S. at 296.

** This Court reaffirmed the vitality of the *Joiner* and *Howey* decisions in *Tcherepnin* v. *Knight*, 389 U.S. at 336-38.

The decisions which have relied on and articulated that principle are too numerous to cite.*

The District Court in this case, following these well-established principles, held that Co-op City's cooperative shares could not be investment contracts because they involved neither the promise nor the possibility of any profit:

> "[I]t is well to note at the outset of this inquiry that it is the fundamental nonprofit nature of this transaction which in this Court's view is the insurmountable barrier to plaintiffs' claims in this federal court." (B19)

* * *

* See, *e.g.*, *SEC* v. *Hagenden-Rimar International, Inc.*, 496 F.2d 1192 (4th Cir. 1974), *aff'g* 362 F. Supp. 323 (E.D. Va. 1973) (sales of interests in scotch whiskey held to be investment contracts. Sales representations predicted investment return of 20 to 25% annually, doubling investment in four years. The District Court noted that even if defendants were merely selling an interest in whiskey, when that interest becomes the subject of speculation, it becomes a security); *Nor-Tex Agencies, Inc.* v. *Jones*, 482 F.2d 1093 (5th Cir. 1973), *cert. den.* —— U.S. —— (1974) (interest in real estate and mineral rights held to be an investment contract; Court held that buyer was induced to speculate in a fractional undivided oil and gas interest and led to expect profits); *SEC* v. *Koscot Interplanetary, Inc.*, No. 73-2339 (5th Cir. July 15, 1974) (Court held that pyramid promotion enterprise involved sale of investment contracts—"Koscot thrives by enticing prospective investors to participate in its enterprise, holding out as a lure the expectation of galactic profits"); *Glen-Arden Commodities Inc.* v. *Costantino*, 493 F.2d 1027 (2d Cir. 1974) (sales of warehouse receipts and evidences of ownership in casks of Scotch whiskey are investment contracts. The Court noted that the "economic inducements" were in the nature of inducements to invest: the lure was not securing scotch but doubling one's money); *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. den.* 414 U.S. 821 (1973) (Turner was not selling lectures to improve sales ability but a "sure route to easy riches," a "get-rich-quick" scheme—an investment contract—in this pyramid promotion scheme); *Continental Marketing Corp.* v. *SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. den.* 391 U.S. 905 (1968) (sale of beavers is investment contract: promise of "geometric profits").

> ". . . [N]one of the documents involved in this transaction . . . ever, once use material, tangible profits as an inducement . . . [and] it is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce. These shares are incapable—by law and by-law—of producing any monetary or fungible return." (B21-22)

In reversing, the Court of Appeals did not find that these cooperative shares could generate profit—as that word is ordinarily used in commerce. Neither did it find there was any inducement, promise or expectation of profit. Nevertheless, it held the cooperative shares to be "investment contracts" and thus "securities," because of savings in personal living expenses (through lower rent and tax deductions) which might be realized by members of the cooperative. That expansion of the concept of "profit," to include the benefits of a public welfare program is, we suggest, an index to the logic of the entire decision. The saving on living expenses enjoyed by residents of Co-op City comes principally from the millions of dollars of government subsidies devoted to the project. The purpose of these subsidies was to meet the urgent housing needs of the citizens of the state,* and not to permit cooperative members to earn a "profit." It is simply astounding to conclude—as did the Court of Appeals—that the benefits of these subsidies are the equivalent of "profit" so as to make Co-op City's cooperative shares the equivalent of speculative interests in orange groves and scotch whiskey.

* Housing Law §§11, 11-a.

IV. The Court of Appeals decision conflicts with guidelines issued by the Securities and Exchange Commission.

In holding Co-op City's cooperative memberships to be "investment contracts" because they might generate "profit" in the form of savings in personal living expenses, the Court of Appeals ran roughshod over rules announced just last year by the Securities and Exchange Commission. Those rules establish guidelines to assist builders of cooperatives and condominiums in determining when their units are "investment contracts" within the meaning of the *Howey* decision and thus "securities," which must be registered, under the federal securities laws.

In Securities Act Release No. 33-5347 (January 4, 1973), the Securities and Exchange Commission announced that purchases and sales of units in conventional residential developments are not transactions in securities.* Rather, residential units are securities only where there is an ex-

* Although Release No. 33-5347 focuses mainly on condominiums, it applies equally to cooperatives. The Release, by its terms, applies to condominiums and "similar types of real estate developments" and refers specifically to cooperative units in several places. Moreover, the Release was issued in response to the Report of the Securities and Exchange Real Estate Advisory Committee established by Chairman William Casey in May of 1972. The Report notes that condominiums and cooperatives should be subject to the same rules:

> "Whether or not the indirect form of property ownership (cooperative) or the direct form of property ownership (condominium) is chosen is most often dictated by such factors as tax impact, zoning, government, insurance or subsidy programs, local acceptance, and the like. The focus from the standpoint of the securities laws should be to separate housing opportunities from investment opportunities properly subject to securities law protection and not on forms of ownership."
>
> Report of the Real Estate Advisory Committee to the Securities and Exchange Commission (October 12, 1972), page 89.

pectation of "profit" as that term is generally used in commerce. Thus the Release states:

> "The existence of various kinds of collateral arrangements may cause an offering of condominium units to involve an offering of investment contracts or interests in a profit sharing agreement. *The presence of such arrangements indicates that the offeror is offering an opportunity through which the purchaser may earn a return on his investment through the managerial efforts of the promoters* or a third party in their operation of the enterprise." (Emphasis supplied.)* (D8).

In promulgating these views, the Securities and Exchange Commission expressly rejected the notion—adopted by the Court of Appeals in this case—that the presence of commercial income from incidental commercial facilities creates a security, stating:

> "In situations where commercial facilities are a part of the common elements of a residential project,

* The Release identifies three situations in which condominium and like interests are securities and therefore must be registered under the 1933 Act:

> "In summary, the offering of condominium units in conjunction with any one of the following will cause the offering to be viewed as an offering of securities in the form of investment contracts:
>
> "'1. The condominiums, with any rental arrangement or other similar service, are offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units. [*sic*]
>
> "'2. The offering of participation in a rental pool arrangement; and
>
> "'3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit.'" (D9-10)

> no registration would be required under the investment contract theory where (a) the income from such facilities is used only to offset common area expenses and (b) the operation of such facilities is incidental to the project as a whole and are not established as a primary income source for the individual owners of a condominium or cooperative unit." (Emphasis supplied.) (D11)

Thus, in the case of residential developments, the SEC does not consider the alleged "profit" from personal income tax deductions, incidental commercial facilities, "below market" or "optimum level" housing costs or even possible gain on resale as "profit" that triggers the *Howey* investment contract test. Instead, consistent with the principles of *Howey,* and indeed of all other securities cases, the SEC's rules on housing units apply only where the purchasers are induced to buy their interests by promises of substantial investment profit.*

Significantly, the Court below did not even mention the SEC guidelines in announcing its novel theory of "profit." That decision now casts doubt on the continued viability of the SEC release and defeats in large part its very purpose, which is to provide guidance on the extent to which existing securities laws and regulations may be applicable to cooperatives and condominiums. The thousands of builders and developers who have relied and are relying on the SEC guidelines can no longer so do with any confidence.

---

* Such cases typically involve resort area facilities which are held out to have high potential for rental income and which often require a pooling and proration of rental receipts from all units.

Conclusi n

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
Attorney for Petitioners

MARTIN LONDON
GEORGE P. FELLEMAN
ALAN G. BLUMBERG
Of Counsel

APPENDICES

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 747—September Term, 1973.

(Argued April 4, 1974 Decided June 12, 1974.)

Docket No. 73-2613

MILTON FORMAN and ELLEN FORMAN, *et al.*,
Appellants,

v.

COMMUNITY SERVICES, INC., UNITED HOUSING FOUNDATION, HAROLD OSTROFF, ROBERT SZOLD, MILTON ALTMAN, GEORGE SCHECHTER, ANTHONY MARINO, PAUL KRAMER, IRVING ALTER, JULIUS GOLDBERG, STATE OF NEW YORK and NEW YORK STATE HOUSING FINANCE AGENCY,

Appellees.

Before:

HAYS and OAKES, *Circuit Judges,*
and CHRISTENSEN, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York, Lawrence W. Pierce, *Judge,* dismissing for lack of federal jurisdiction a complaint alleging violations of 15 U.S.C. §§77q(a), 77v(a), 78t, 78aa, 42 U.S.C. §1983, and 17 C.F.R. §240.10b-5.

Reversed and remanded.

---

* Senior United States District Judge for the District of Utah, sitting by designation.

Louis Nizer, New York, N.Y. (Phillips, Nizer, Benjamin, Krim & Ballon; George Berger, Jay F. Gordon, Richard S. Brooks, Janet P. Kane, New York, N.Y., of counsel), *for Appellants.*

Simon H. Rifkind, New York, N.Y. (Paul Weiss, Rifkind, Wharton & Garrison; Alan G. Blumberg, New York, N.Y.; Martin London and George P. Felleman, of counsel), *for Appellees.*

Daniel M. Cohen, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York; Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Appellees State of New York and New York State Housing Finance Agency.*

Oakes, *Circuit Judge*:

This appeal by resident tenants of Co-op City presents the question whether a share of stock in a cooperative apartment nonprofit company chartered and subsidized under the State of New York's Mitchell-Lama Act[1] is a "security" within the meaning of the federal securities laws. All the appellees urge that because there is no promise, expectation or possibility of profit in connection with a member's resale of a cooperative share and because the cooperative housing company is created pursuant to an emergency state program for low cost housing, state financed and supervised, and sponsored by a nonprofit foundation, that cooperative shares in it are not securities. The appellee New York State Housing Finance Agency ("the agency") also claims not to be a "person" within

1. New York Private Housing Finance Law §§10-37.

the meaning of the Civil Rights Act of 1871, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343 (3), and the appellee State of New York claims not to be a proper defendant under 42 U.S.C. §1983, as well as immune under the eleventh amendment of the United States Constitution. The court below, finding that the cooperative shares involved were not "securit[ies]," dismissed the counts of the amended complaint alleging violations of the federal securities laws as to all defendants and, since the federal securities allegations represented the only "well pleaded" underlying basis for jurisdiction under the Civil Rights Act, dismissed the complaint as to the state agency. The remaining counts were dismissed as against the named defendants, since they set forth pendent claims asserted pursuant to state law. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966). The complaint was therefore accordingly dismissed in its entirety for lack of subject matter jurisdiction. 366 F. Supp. 1117 (S.D. N.Y. 1973). Expressing no opinion whatsoever on the merits, but finding jurisdiction nevertheless, we reverse and remand.

Appellants are 57 residents owning some 30 apartment units in Co-op City, a huge low-middle income cooperative housing project located in the borough of the Bronx, New York City. Co-op City is apparently the largest cooperative housing development in the United States, presently housing some 45,000 people, with more than 30 high-rise buildings and 230 town houses and a total of 15,400 apartment units ranging from three to seven rooms, on a 200-acre site. Appellants allege on behalf of themselves and all other residents violations by the defendants of the

antifraud provisions of the Securities Act of 1933, 15 U.S.C. §77q(a), and the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. The complaint alleges in respect to the defendant New York State Housing Finance Agency that plaintiffs' civil rights have been violated by virtue of the securities law violations alleged directly against the other defendants.

The corporate defendants, appellees here, include United Housing Foundation (UHF) which initiated and sponsored the project. UHF was formed in 1951 under New York's nonprofit corporation statute, New York Not-for-Profit Corporation Law, with the purpose of fostering the growth of nonprofit cooperative housing for low and low-middle income families and, in addition to Co-op City, it has participated in the sponsorship of several other New York cooperative housing projects; UHF's membership includes housing cooperatives, civic groups and labor unions. Community Service, Inc. (CSI), is the general contractor and sales agent for the project. CSI was organized under the New York Business Corporations Law, for profit, even though it is a wholly owned subsidiary of UHF. The third corporate defendant is Riverbay Corporation (Riverbay), which is the cooperative housing corporation in which plaintiffs purchased shares and which owns and operates the project. Riverbay was organized by UHF as a "mutual company" under New York's Mitchell-Lama Act, note 1, *supra*;[2] it is named as a defendant here principally, if not

2. The act essentially provides for the creation of "limited profit housing companies," §13, which, subject to state or local supervision, may borrow up to 95 per cent of the project cost at low interest from

[*footnote continued on next page*]

only, in respect to the derivative causes of action alleged on its behalf under New York state law. The individual defendants are officers or directors or both of some or all of the corporate defendants. Pursuant to the Mitchell-Lama Act, the defendant agency provided the bulk of the financing for the project through long-term low-interest mortgage loans, and the defendant New York State Division of Housing and Community Renewal (the "Division of Housing") through its commissioner is responsible for the supervision of the development, construction, promotion and operation of the project.

Basically under the Mitchell-Lama Act, cooperatives which are subsidized and supervised are owned by a mutual company formed under the Act, the stock of which is held by the actual tenants, as here. Section 12(2-b). No one may live in the project whose probable aggregate income exceeds six times the rental fees, §31(2)(a), (b), and there is a preference to the aged, the handicapped and veterans, §§11, 31(7)(a), (b). Plaintiffs here secured their right to occupancy by completing a subscription agreement and apartment application form wherein they agreed to subscribe to 18 shares of Riverbay common stock at $25 par value per share for each room in the apartment they selected. Under the bylaws of Riverbay, each stockolder is entitled to only one vote on any and all matters regardless of the number of shares of capital stock or any other equity obligations of the housing company which the stockholder owns. Also, the stock may not be

the state or a municipality to construct and operate the project, rent apartments therein, etc. Sections 22, 27-31. Tax exemptions are provided, §33, as is the right of condemnation on behalf of a municipality for the cooperative company, §29.

owned separate and apart from actual occupancy in Co-op City, nor may it be pledged or otherwise encumbered. The shares descend intact (together with the right to occupancy) only to a surviving spouse, and a tenant who wishes to move out or is forced out, whether by way of violation of the lease or by virtue of his income, must divest himself of the stock by offering it for repurchase, in which case he will be compensated with exactly the amount he paid for the stock. In the event Riverbay does not exercise its right to repurchase (for which it had established a reserve fund of approximately $917,000 as of December 31, 1972), the stockholder is free to sell his shares elsewhere, although under §31-a of the Mitchell-Lama Act he may not sell them for more than the original purchase price plus a pro rata fraction of the mortgage amortization paid during his tenure at Co-op City.

The obligations of the Co-op City resident flow from his lease, not from his stock. In addition, to what the trial court has termed the usual landlord-tenant covenants with respect to services and care of the premises, the resident is required to pay annual carrying charges pro rated in advance monthly payments, the pro rata portion being based not on the number of shares owned but on the size, type and location of his apartment. This monthly payment is, as in the case of other cooperatives, in reality rent, that is to say, it represents a proportionate allocation of the expenses of Riverbay in connection with the ownership, maintenance, operations, taxes, mortgage indebtedness, repairs, improvements, wages for employees, etc.

The gravamen of the appellants' amended complaint relates to the carrying charges for Co-op City apartments, and particularly the initial "Information Bulletin" circulated by CSI as sales agent for Riverbay through the mail, originally setting forth an estimated average monthly carrying charge of $23.02 per room. This meant that a prospect for a four-room apartment could expect to pay $1,800 for stock in Riverbay and a monthly rent thereafter of $92.08. The cost of the project, however, increased while it was being built, and in 1968 the current "Information Bulletin" was revised upward to $25 per room per month, then in 1970-72 to $29.39, then in 1973-74, $35.27. Because it is now estimated that the charge will be $39.68 effective July 1, 1974, what originally was a $92.08 monthly rental bargain for a four-room apartment will now be $148.72 per month. For those who have fixed incomes or whose wages have not gone up with inflation, the change in carrying charges is most serious.[3] The complaint charges in substance that there were misrepresentations and material omissions in the "Information Bulletins." It is said, for example, that there was stated a lump sum price of $258,678,000 for the construction of the project to be financed with a $250,000,000 mortgage from the agency, and the Bulletin did go on to state that "the risk of completing the construction within the lump sum price is on the contractor." However, it is alleged, the agency and other defendants agreed to a final construction bill of $340,500,000, which was financed through

3. At the same time, because the maximum income eligibility is related to carrying charges, there has been a proportionate increase therein, so that, as the district court pointed out, for tenants who are employed it is possible that little or no real hardship has occurred.

a $125,000,000 increase in the mortgage loan, thereby substantially increasing the carrying charges.[4] Some other allegations apparently are that the "Information Bulletins" failed to disclose that the State Housing Commissioner had waived the liquidity requirement for contractors imposed by the Guide for Development of Limited Profit Housing, Preliminary Submissions, State of New York Division of Housing and Community Renewal p. 35, and further failed to disclose that the contractor was a wholly owned subsidiary of UHF.

As stated above, the district court determined that the shares in Riverbay were not securities within the meaning of the federal securities laws, and therefore the court was without jurisdiction over the claims. This holding we reverse for reasons which follow, finding the Riverbay shares to be securities within the federal law and thus conferring federal jurisdiction over appellants' claims. As to the substance of those claims, whether they state claims for which relief can be granted or whether any damages are cognizable, as we have said, we intimate no conclusion.

The definition of "security" in the Securities Exchange Act of 1934, §3a(10), 15 U.S.C. §78c(10), is set out in full in the margin,[5] but for our purposes may be read as fol-

4. Of course, on the merits the appellees would point out that the "Information Bulletins" state that the lump sum price is subject to addition or deduction for change orders during the progress of construction and that they also warn that it is possible that increases in costs may increase the average monthly estimate.

5. 15 U.S.C. §78c(10):

> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

[*footnote continued on next page*]

lows: "The term 'security' means any . . . stock . . . investment contract . . . or in general, any instrument commonly known as a 'security'. . . ." The definition in the Securities Act of 1933, 15 U.S.C. §77b(1), is "virtually identical" and interchangeable with that in the 1934 Act, *Tcherepnin* v. *Knight,* 389 U.S. 332, 335-36 (1967); *Glen-Arden Commodities, Inc.* v. *Costantino,* Nos. 74-1039, -1069, -1236 (2d Cir. Mar. 14, 1974), slip op. 2175, 2187 n.6.

It should be mentioned that shares have not yet been issued to the appellants. For all purposes, however, we may treat the case as if the shares had been issued. Appellants have all signed the extensive subscription agreement under which they subscribe to class B capital stock of Riverbay Corporation at par value (the number of shares depending on the number of rooms in the apartment), and they all agreed to pay the full subscription price on the signing of the application. We agree with the court below (and the appellees do not seriously contend otherwise) that despite a contrary statement in the subscription agreement[6]

6. The application states that the stock is not to be issued or delivered until the project has been completed and a certificate of acceptability to the housing company has been issued by the commissioner. It also states that "Until so issued and delivered, the Subscriber shall not be deemed to be a stockholder nor the holder of any other equity obligation of the Housing Company." Paragraph (5).

the tenants of Co-op City have purchased the right to own shares, and that is enough under the federal statutes to bring them within their coverage. 15 U.S.C. §78c(a)(13).[7] In total the shareholders of Riverbay have paid $32,803,200 for their stock.

Some incidents of ownership of Riverbay common stock are identical to those of other cooperative real estate corporations' stock. The owner of the certificate has the right to vote in the affairs of the corporation.[8] He has the right to take income tax deductions for a portion of his monthly carrying charges. He has the right to enter into an occupancy agreement and his shares upon his death pass to his spouse together with the right to occupy. Rental income from Riverbay's leases of commercial and office space is available to pay its general expenses, thereby reducing its need for carrying charge income from the appellants. Other aspects of Riverbay stock are common but not universal. For instance, the stock may not be pledged or otherwise encumbered or owned by someone who does not occupy one of the cooperative apartments. *Cf. Penthouse Properties, Inc.* v. *1158 Fifth Avenue, Inc.*, 256 App. Div. 685, 11 N.Y.S.2d 417 (1st Dep't 1939). If a stockholder wishes to sell or must sell, Riverbay has the right of first

7. 15 U.S.C. §78c(a)(13) provides: "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

8. While the owners do not, as is usually the case, have a separate vote for each share held, instead having one vote per apartment, this would have little, if any, functional difference where here one has one vote among some 45,000 and where otherwise the maximum one could have would be 126 votes (18 shares times seven rooms) of over one million. In either case any individual's vote or votes would not be terribly significant.

refusal to purchase. More unusual is the provision that the right of repurchase by Riverbay is at the *original* purchase price. Even this, however, is not a unique provision. *See, e.g., Allen* v. *Biltmore Tissue Corp.*, 2 N.Y.S.2d 534, 161 N.Y.S.2d 418, 141 N.E.2d 812 (1957). Thus it can be seen that basically the stock here is similar to that of other cooperative real estate corporations. Such stock has recently been held to be a security under the Securities Acts. *1050 Tenants Corp.* v. *Jakobson*, 365 F. Supp. 1171 (S.D. N.Y. 1973), *appeal pending*.

One basis for such a finding is the so-called literal approach. *See* Jennings & Marsh, Securities Regulation 299-300 (3d ed. 1973); Note, *Cooperative Housing Corporations and the Federal Securities Laws*, 71 Colum. L. Rev. 118 (1971); Sobieski, *Securities Regulation in California: Recent Developments*, 11 U.C.L.A. L. Rev. 1, 7-8 (1963); Wenig & Schulz, *Government Regulation of Condominiums in California*, 14 Hastings L.J. 222, 233 (1963). According to this approach the fact that "stock" certificates are used in a "stock" corporation is sufficient in itself to bring transactions in the "stock" within the literal definition of the Acts. As Jennings & Marsh state at 299-300, "When a stock corporation is used, the securities acts literally apply, even though the profit motive is not dominant." Professor Loss has put it, "When the ownership of an individual apartment is evidence by stock in the cooperative, as it usually is, the federal and state securities statutes would seem literally to apply." 1 L. Loss, Securities Regulation 492-93 (2d ed. 1961) (footnotes omitted). Judge Mansfield as a district judge supported the literal application of specific definitions of securities so as to *include* instruments within

the coverage of the acts. *Movielab, Inc.* v. *Berkey Photo, Inc.*, 321 F. Supp. 806 (S.D.N.Y. 1970), *aff'd*, 452 F.2d 662 (2d Cir. 1971). The Supreme Court said in *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943), *reaffirmed in Tcherepnin* v. *Knight*, 389 U.S. at 339,

> In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well-settled meaning. . . . *Instruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description.* However, the reach of the Act does not stop with the obvious and commonplace. . . .

(Emphasis added.) This language gives support to the proposition that if a given instrument is a share of stock "on its face" it is literally within the ambit of the statute. Expansive or interpretive readings given to other definitions within the Act, principally "investment contracts," generally have been to bring debatable transactions *within* the statute's coverage. It may be argued, moreover, that there is some underlying justification for such a formal approach. That is, where one utilizes the outward and traditional manifestations of a "stock" organization, the buyer may be led to believe that what he is buying is "stock" as normally considered and which would be protected by the federal or state securities laws. Indeed, the buyer of the purported "stock" may rely to some extent on the notion that he will at least be protected by those laws. It would be anomalous, the argument runs, were

one who was defrauded as to the nature of the instrument, "stock" on its face, to be deprived of antifraud provisions directed at "stock" transactions.

Appellees, nevertheless, argue that we must examine the context in which the instrument in question arose and whether that context warrants a literal application of the terms of this statute, for the definitional section, §3(a) of the 1934 Act, 15 U.S.C. §78c(a), commences:

> (a) When used in this chapter, *unless the context otherwise requires*—
>
> . . . .
>
> (10) [definition of security]

(Emphasis added.) There is no doubt that the 1933 and 1934 Acts arose in the first instance in connection with the regulation of conduct in commercial marketplaces primarily to require disclosure of financial information for the protection of investors, curbing excessive speculation, market manipulation and the like. *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 2 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 3-5 (1934). And as *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. at 351, said, "the term 'security' was defined to include by name or description many documents in which there is common trading for speculation or investment." Thus while form has been disregarded for substance customarily in *extending* coverage of the Act, *Tcherepnin* v. *Knight*, 389 U.S. at 336, there is still substantial authority for the proposition that substance should govern rather than form even to restrict coverage of the Acts. *See* 1 Loss, *supra*, at 493 ("just as some things which look like real estate are securities, some things

which look like securities are real estate"). *Lino* v. *City Investing Co.*, 487 F.2d 689 (3d Cir. 1973) (promissory notes given in part payment of purchase price by franchise purchaser held not to be security). *See also SEC* v. *Fifth Avenue Coach Lines, Inc.*, 289 F. Supp 3 (S.D.N.Y. 1968) (note given for personal loan), *aff'd without consideration of the point*, 435 F.2d 510 (2d Cir. 1970).

However, appellees would be no better off were we to agree with them that we must look through form to substance even where the result is to limit coverage of the Act.[9] Interestingly, although the SEC has not said whether it is treating cooperative shares formally as stock or substantial'y as "investment contracts," by Rule 235 of the General Rules and Regulations under the Securities Act of 1933, 17 C.F.R. §230.235, the SEC has exempted from registration the stock of certain cooperative housing corporations and thereby implicitly recognized that other cooperative housing securities might be subject to other provisions of the securities laws. *Cf. Tcherepnin* v. *Knight*, 389 U.S. at 341-42. *See also SEC* v. *Associated Gas & Electric Co.*, 99 F.2d 795, 798 (2d Cir. 1938).

---

9. We note that the Supreme Court continues to remind us that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). We also note that cooperative stock is subject to the Blue Sky laws of many states, including those of New York, as acknowledged by the court below, 366 F. Supp. at 1121 n.10. *See* New York General Business Law §352-e.

To look to the substance of the term "stock" is in essence to determine if a "investment contract" of some sort exists. The basic test to ascertain the presence of an "investment contract" was formulated by the Supreme Court in *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946):

> In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . .

Appellees argue, as the trial court found, that there is no promise, expectation or possibility of profit[10] in connection with a member's resale of Riverbay's cooperative shares, and that this "nonprofit nature" together with the "noncommercial nature" of the development and the "rigid statutory controls" over the enterprise compel the conclusion that the shares are not "investment contracts" and hence securities under the federal laws. While these arguments are not without legal support, we are not persuaded by them. Before considering the question of profit, there is no doubt that in the words of *Howey* there was here a "transaction whereby a person invests his money in a common enterprise" and that if there is any expectation of profits at all that these would come "solely from the efforts of the promoter or a third party."

The harder question is, of course, whether there is any expectation of profit by appellants. Initially it must be

---

10. Appellees would use that term mechanically or literally and not in the sense of "economic inducement" that the Court referred to in *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. at 352-53. *See also SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967).

conceded that there is no possible profit on a resale of the stock. If Riverbay does not buy the stock back at its original price, the shareholder can only sell it for the original price plus a fraction of his pro rata amortization of the mortgage. Private Housing Finance Law §31-a. Profit, however, need not be realized only in capital appreciation; equally important is the possibility of income from the investment. Here the shareholders have an expectation of "income" in at least three ways. First, and most directly, the tenant shareholders are able to share in the income from the leasing of retail establishments, office space, parking, and other commercial enterprises on the premises. The retail stores allegedly pay some $1,106,000 in rent to Riverbay. Income from renting office space and from coin-operated washing machines is stated to be $667,000 annually. Finally, some $2.5 million per year in parking fees is apparently collected from both tenants and others. In short, the shareholders may share—through the corporation—in substantial income. Admittedly, this income is not likely to come in the form of a dividend check (although according to the law dividends may be paid after all costs and expenses have been paid, *see* Private Housing Finance Law §28) but rather in the form of reduced carrying charges to shareholder/tenants. The form that this income takes, however, is not determinative; in either case the shareholders are receiving a direct monetary benefit and, as such, "profit" within the *Howey* concept. *See 1050 Tenants Corp.* v. *Jakobson,* 365 F. Supp. at 1176. *See also Davenport* v. *United States,* 260 F.2d 591 (9th Cir. 1958), *cert. denied,* 359 U.S. 909 (1959) (purchasers of cooperative memberships promised job security in plant to be constructed); *SEC* v. *American Foundation for Advanced Education,* 222 F. Supp. 828 (W.D. La. 1963); *Silver Hills Country Club* v. *Sobieski,* 55 Cal. 2d 811, 361 P.2d 906 (1961) (Traynor, J.); 1 L. Loss, *supra,* at 493-94; Zammit, *Securities Law Aspects of Cooperative Housing,* 169 N.Y.L.J. No. 5, at 1, col. 3 (Jan. 8, 1973); Note, *supra,* 71 Colum. L. Rev. at 129-31.

Another way of realizing income through the ownership of shares in Riverbay is the ability to partake of certain tax benefits—notably a deduction for a pro rata share of the mortgage interest payments. Investment schem s whose purpose is to provide tax losses and thereby generate deductions are usually reserved for the well-heeled, but here the opportunity to make tax savings, even for those in a low bracket, is a substantial inducement to buy shares, where the alternative is the payment of rent with no tax benefits. *See 1050 Tenants Corp.* v. *Jakobson,* 365 F. Supp. at 1176.

A third way in which it might be viewed that profits may be realized is in the saving of an expense which would otherwise necessarily be incurred. In other words, where the going rate for rents in a given area is one amount, an investment opportunity offering housing at an amount substantially below that going rate is an offer of a "profit," for housing is a necessity and any saving on that necessity is money in one's pocket. While the state cases are, of course, not binding upon us, we incline to agree with *State ex rel. Troy* v. *Lumbermen's Clinic,* 186 Wash. 384, 394-95, 58 P.2d 812, 816 (1936):

> A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefited.

> If respondent renders to its incorporators or members, or to businesses in which they are interested and in whose profits they share, a service at a cost lower than that which would otherwise be paid for such service, the respondent's operations result in a profit to its members.

See also Pine Grove Manor, Inc. v. *Director,* 68 N.J. Super. 135, 171 A.2d 676 (Super. Ct. App. Div. 1961); *Commonwealth* v. *2101 Cooperative, Inc. (No. 1),* 27 Pa. D.&C.2d 405 (C.P. 1961), *aff'd per curiam,* 408 Pa. 24, 183 A.2d 325 (1962); *State ex rel. Russell* v. *Sweeney,* 153 Ohio St. 66, 41 Ohio Op. 143, 91 N.E.2d 13 (1950). Viewing the savings, which were promised here by appellees, over rents for comparable accommodations as "profits" as well, we find a contract for an investment, which carried with it a risk of loss of that investment, to be an invesment contract under the Securities Acts.

The fact that the shares are issued and sold by a nonprofit corporation is in and of itself immaterial; certainly if the corporation went bankrupt, the shareholders would have sustained a loss in the amount of their investment, and there is nothing to say that a nonprofit corporation necessarily must not go bankrupt. Nor is there anything in the nonprofit nature of a corporation which provides assurances that it will not deceive and defraud buyers or owners of shares.

The fact, too, that the cooperative was created and remains under considerable general supervision of the State of New York through its Housing Agency and Commissioner of the Division of Housing surely does not remove the stock from the federal Securities Acts' ambit. In the first place, many of their regulatory duties are aimed at

preserving the quality of the assets supporting the mortgage loan. Their principal purpose thus is not necessarily to protect the shareholders. Indeed, there are any number of industries such as public utilities that are at least as closely regulated by the State as are the sponsor, contractor and cooperative company here and whose stock is clearly subject to federal regulation. Nor does the fact that there are eleemosynary elements underlying the statute, perhaps indeed underlying the services rendered by the nonprofit sponsor, UHF, take the case from without the protection of the securities laws. Indeed, the for-profit subsidiary of UHF, CSI, the contractor here, could very well stand to benefit substantially by the price paid to it for its contracting services, the very point at issue under the appellants' pleadings.[11] The fact that there may be no profit motive on the part of the promoter, UHF, does not by any means affect the profit motives on the part of the subscribers above referred to, nor would it necessarily affect the profit motive on the part of the contractor, the directors and officers of whom might conceivably—were they evil men—be receiving considerable compensation. Nor would the lack of a profit motive eliminate the incentive for fraudulent or deceptive practices in the sale of cooperative stock. Whether it were to recoup advances already made or to retain a particular reputation even a nonprofit entity may encounter pressures which might have the tendency to change an otherwise objective and fair sales pitch to something likely to entice and mislead.

11. This, of course, is a question on the merits, in the event that a claim is actually stated for which relief can be granted, as to which we express no opinion.

We hold, then, that a share in Riverbay is both "stock" and an "investment contract" under the Securities Acts. We pass to the special defenses of the State Housing Finance Agency and of the State of New York.

The State Housing Finance Agency argues that it may not be charged with violation of §1983. While municipal corporations, that is, municipalities, are not deemed "persons" under the Civil Rights Act, *see Monroe* v. *Pape,* 365 U.S. 167, 187-90 (1960), "agencies" have always been so deemed. *See, e.g., Escalera* v. *New York City Housing Authority,* 425 F.2d 853 (2d Cir. 1970), *cert. denied,* 400 U.S. 853 (1971); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2d Cir. 1968). The agency here, moreover, is not protected by sovereign immunity. First, Private Housing Finance Law §32(5)[12] expressly waives sovereign immunity for the agency. Even were such a waiver absent, the agency is not an "alter ego" of the state, *see Whitten* v. *State University Construction Fund,* —— F.2d —— (1st Cir. 1974) (Moore, J.), and hence not a recipient of sovereign immunity. The State Housing Finance Agency has the express authority to sue and be sued; it acts only as a credit or financing entity; it apparently has no power to take property in its own name or in the name of the State. In *Whitten* the court found "ultimate State liability" to be the most crucial determination.

12. Section 32(5):

> With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued *in the same manner as a private person.* No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation.
>
> (Emphasis added.)

Here the State is expressly *not* liable for the debts of the agency. Private Housing Finance Law §46(8). Thus, upon these considerations it would appear that the agency here is sufficiently independent of the State as not to enjoy sovereign immunity. *Compare Matherson* v. *Long Island State Park Commission,* 442 F.2d 566 (2d Cir. 1971) (Jones Beach Parkway Authority not alter ego); *Zeidner* v. *Wulforst,* 197 F. Supp. 23, 25 (E.D.N.Y. 1961) (New York Thruway Authority not alter ego); *In re Dormitory Authority,* 18 N.Y.2d 114, 271 N.Y.S.2d 983, 218 N.E.2d 693 (1966) (Dormitory Authority of State of New York has no sovereign immunity); *Story House Corp.* v. *Job Development Authority,* 37 App. Div. 2d 345, 325 N.Y.S.2d 659 (3d Dep't 1971), *aff'd mem.,* 31 N.Y.2d 942, 340 N.Y.S.2d 929, 293 N.E.2d 97 (1972) (State of New York Job Development Authority has no sovereign immunity), *with Whitten* v. *State University Construction Fund, supra* (State University Construction Fund has sovereign immunity; *Charles Simkin & Sons, Inc.* v. *State University Construction Fund,* 352 F. Supp. 177 (S.D.N.Y.), *aff'd mem.,* 486 F.2d 1393 (2d Cir. 1973) (State University Construction Fund has sovereign immunity); *State University of New York* v. *Syracuse University,* 206 Misc. 1003, 137 N.Y.2d 916 (Sup. Ct.), *aff'd,* 285 App. Div. 59, 136 N.Y.S.2d 539 (3d Dep't 1954) (State University has sovereign immunity).

The State itself argues that the court below lacks jurisdiction over it. Again, however, the State has expressly waived sovereign immunity in Private Housing Finance Law §32(5), note 12 *supra.* Secondly, the State has waived its sovereign immunity with respect to federal securities laws violations by voluntarily entering a field

under federal regulation. *See Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964). Thus when the State enacted the Mitchell-Lama Act in 1955 and codified it in 1961, it did so with the knowledge that transactions involving subscriptions for stock solicited through the mails were already within the ambit of federal anti-fraud regulations and statutes. To paraphrase the court's opinion in *Parden*, 377 U.S. at 192, by enacting the federal securities laws in the exercise of the Commerce Clause—a power given to the federal government by the states in adopting and ratifying the constitution—the Congress conditioned the right to be involved in the sale and distribution of securities upon amenability to suit in federal court as provided by those regulatory laws.[13] Were there any doubt that the securities laws were intended to reach states or their agencies, the legislative history dispels it. *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 11.

Again, in reversing the district court we make no suggestion regarding the viability of appellants' claims, except to find that the cooperative shares involved are securities so as to confer jurisdiction on the federal court.

Judgment reversed and remanded.

---

13. *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973), is distinguishable. There, unlike this case and *Parden*, the state's activity came first, the federal regulation second. In this posture, the Court held, the state could not be found to have waived its immunity; rather Congress would be required explicitly to override it. Here and in *Parden*, however, the regulatory system was in effect before the state entered the field. That entry into the regulated field thus constituted a waiver of the state's immunity.

Appendix B

Opinion of the District Court

MILTON and ELLEN FORMAN *et al.*,
Plaintiffs,

v.

COMMUNITY SERVICES, INC., *et al.*,
Defendants.

No. 72 Civ. 3980.

United States District Court,

S. D. New York.

Sept. 6, 1973.

George Berger, Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for plaintiffs.

Martin London, Paul Weiss, Rifkind, Wharton & Garrison, New York City, for defendants Community Services, Inc., United Housing Foundation, Harold Ostroff, Robert Szold, Milton Altman, George Schechter, Anthony Marino, Irving Alter, Julius Goldberg, and Paul Kramer.

Alan G. Blumberg, Szold, Brandwen, Meyers & Altman, New York City, for defendants Szold, Altman, Alter.

David Peck, Sullivan & Cromwell, New York City, for Riverbay Corp.

Louis J. Lefkowitz, Atty. Gen. of the State of New York by Daniel M. Cohen, Asst. Atty. Gen., New York City for defendants State of New York and New York State Housing Finance Agency.

Appendix B

PIERCE, District Judge.

This action has been commenced by 57 residents of Co-op City,[1] a low-middle income cooperative housing project located in the Borough of the Bronx, New York City. They sue on behalf of themselves and all other residents of Co-op City, alleging, among other things, violations of the anti-fraud provisions of the Securities Exchange Act of 1934,[2] and of the Securities Act of 1933,[3] in connection with the sale to plaintiffs of shares of the common stock of the cooperative housing corporation.

The amended complaint also asserts violations of the plaintiffs' civil rights by one of the government defendants,[4] premised upon the protections afforded by the federal securities laws; and it further sets forth several claims, pendent to the federal claims, based on New York State law, including an asserted derivative cause of action on behalf of the cooperative corporation.

The corporate defendants constitute the amalgam which conceived, built, promoted and, at this time, controls the management of Co-op City. United Housing Foundation (UHF) initiated and sponsored the project.[5] UHF was

1. Many are husbands and wives who own jointly their interest in a single apartment unit. Thus, altogether, there are occupants of 30 apartments named as plaintiffs.

2. 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

3. 15 U.S.C. §77q(a).

4. 42 U.S.C. §§1983, 1988.

5. UHF was formed in 1951 with the primary purpose of fostering the growth of nonprofit cooperative housing for low and low-middle income families. In addition to Co-op City, it has sponsored or participated in the sponsorship of more than eight other cooperative housing projects located in various boroughs of New York City.

Appendix B

organized under New York's nonprofit corporation statute[6] and is comprised of housing cooperatives, civic groups and labor unions. Community Services Inc. (CSI) is the general contractor and sales agent for the project. CSI was organized under New York's business corporation statute[7] and is a wholly owned subsidiary of UHF. Riverbay Corporation (Riverbay) is the cooperative housing corporation in which plaintiffs purchased shares, and which owns and operates the project. Riverbay was organized by UHF as a "mutual company" under New York's Mitchell-Lama Act,[8] and is named as a defendant here only to facilitate the derivative aspects of the action.

The individual defendants are officers or directors, or both, of some, and in some cases all, of the corporate defendants.

Pursuant to the Mitchell-Lama Act, the defendant New York State Housing Finance Agency (the Agency) provided the bulk of the financing for the project through long-term, low-interest mortgage loans; and the defendant New York State Division of Housing and Community Renewal (the State Division) is responsible for the supervision of the development, construction, promotion and operation of the project.

The question before this Court, raised by defendants' motion to dismiss for lack of subject matter jurisdiction,

6. N.Y. Not-For-Profit Corporation Law (McKinney's Consol. Laws, c. 4, 1962).

7. N.Y. Business Corporations Law (McKinney's Consol. Laws, c. 35, 1962).

8. N.Y. Private Housing Finance Law §§10-37 (McKinney's Consol. Laws, c. 44B, 1962).

is narrow, but dispositive: *Is a "share" of a state-financed and supervised, nonprofit cooperative housing corporation a "security" within the meaning of the federal securities laws?*[9] If so, plaintiffs are properly in federal court; if not, each of the alleged bases for federal jurisdiction must fail, and with them, the pendent state claims.

[1] For the reasons set forth herein, this Court holds that the shares involved in this action are not "securities" within the meaning of the federal securities laws, and dismisses the complaint in its entirety pursuant to Fed.R. Civ.P. 12. Such ruling has no bearing on the merits of plaintiffs' grievances, which may well deserve to be fully aired in appropriate New York State forums.[10]

Background

Co-op City is no ordinary enterprise. Reputed to be the largest cooperative housing development in the United States, the project was conceived in 1964, completed in 1972, and presently houses some 45,000 people. The complex is located on a 200-acre site, includes more than 30 high-rise buildings and more than 230 townhouses, which in total provide about 15,400 apartment units ranging from three to seven rooms.

The project was facilitated by New York's salutary Mitchell-Lama Act, the express purpose of which is to ad-

9. Securities Exchange Act of 1934, 15 U.S.C. §78c(10); Securities Act of 1933, 15 U.S.C. §77b(1).

10. Shares of cooperative housing corporations are "securities" within the meaning and protection of New York's anti-fraud laws. N.Y. General Business Law, §352-e (McKinney Supp. 1972-73). *Cf.* People v. Cadplaz Sponsors, Inc., 69 Misc.2d 417, 330 N.Y.S.2d 430 (Sup.Ct.1972).

dress critical housing problems in New York's urban areas by encouraging private enterprise to participate with the state and municipalities[11] in the creation of nonprofit housing cooperative undertakings for persons with low incomes.[12] Toward that goal, the Agency is empowered to provide low-interest financing through the issuance of loans secured by first mortgages on the projects;[13] and tax ex-

11. The New York State Legislature, as part of the policies and purposes of the Mitchell-Lama Act has declared that

> [T]here exists in municipalities in this state a seriously inadequate supply of safe and sanitary dwelling . . . accommodations for families and persons of low income . . . that such conditions are due, in large measure, to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air and space, improper sanitary facilities and inadequate protection from fire hazards; that such conditions constitute an emergency and a grave menace to the health, safety, morals, welfare and comfort of citizens of this state, necessitating speedy relief which cannot readily be provided by the ordinary unaided operation of private enterprise and require that provisions be made by which private free enterprise may be encouraged to invest in companies regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing such housing facilities and other facilities incidental or appurtenant thereto for families or persons of low income . . . N.Y. Private Housing Finance Law §11 (McKinney Supp. 1972-73).

12. As part of additional policy and purposes of the Mitchell-Lama Act, the New York State Legislature has found that

> [I]mprovement of the physical environment and revitalization of the quality of urban life . . . would be promoted by cooperative action by tenants who are persons or families of low income to acquire ownership of their dwellings and to operate them on a *nonprofit* basis; that such cooperative undertakings, with their consequent pride and responsibility of ownership would . . . lead to the stabilization and renewal of deteriorating neighborhoods. N.Y. Private Housing Finance Law §11-a(2-a) (McKinney Supp. 1972-73) (emphasis added).

13. N.Y. Private Housing Finance Law §§20, 22, 26, as amended (McKinney Supp. 1972-73).

emptions,[14] and certain other inducements are provided for corporate participants from the private sector.[15]

State regulation and supervision of the housing enterprises built under the Mitchell-Lama Act is mandated by law. The cooperative corporation cannot be created without the approval of the Commissioner of the State Division.[16] The statute mandates that no directors or subscribers to its stock may profit from the resale of such stock,[17] and provides that the tenant may not sublet at a price greater than approved by the Commissioner.[18] The statute requires the Commissioner's approval before the corporation can contract for operation of the project.[19]

14. N.Y. Private Housing Finance Law §33, as amended, (McKinney Supp. 1972-73).

15. For instance, the acquisition of the property for a housing project pursuant to the Act declared to be necessary for the public purpose, and a municipality may take property by condemnation for the cooperative company. N.Y. Private Housing Finance Law §29, as amended, (McKinney Supp. 1972-73).

16. N.Y. Private Housing Finance Law §14 (McKinney 1962).

17. The statute requires that the certificate of incorporation for corporations such as Riverbay, shall state that

> [T]he company has been organized to serve a public purpose and that it shall be and remain subject to the supervision and control of the commissioner . . . that all real and personal property acquired by it, and all structures erected or rehabilitated by it, shall be deemed to be acquired, rehabilitated or created for the proper effectuation of the purposes of this article, and that the directors and subscribers of such company shall be deemed to have agreed that they shall at no time receive or accept from such company in repayment of their investment in its stock any sums in excess of the par value of the stock . . .

N.Y. Private Housing Law §13(13), as amended (McKinney Supp. 1972-73).

18. N.Y. Private Housing Finance Law §31(1)(a) (McKinney 1962).

19. N.Y. Private Housing Finance Law §27(4)(d) (McKinney 1962).

In fact, from the initiation of a project and continuing thereafter state control is pervasive.[20]

It is contemplated that a Mitchell-Lama cooperative project thus subsidized and supervised will be owned by a mutual company formed under the Act whose stock is held almost exclusively by persons who actually live in the project.[21] In accord with the purposes of the Act, the legislature has declared that no one may live in the project whose probable aggregate income exceeds six times the rental fees[22] and further, the legislature has indicated that preference shall go to the aged, the handicapped and to veterans.[23]

20. The cooperative corporation cannot borrow or give security without the Commissioner's approval. N.Y. Private Housing Finance Law §20(1) (McKinney 1962); its capital structure is dictated by law and subject to the Commissioner's approval, Id. §21; the cooperative may not acquire real property, enter into any contract for construction or alteration of any real property, or sell any property, encumber or lease any real property, make any contracts for operation of the project, issue a guarantee of payment or enter into contracts for payment of salaries to officers or employees without the Commissioner's approval, Id. §§17, 27, 29. The Commissioner has the power to fix and to overrule the cooperative's rental structure, Id. §31(1); to investigate all aspects of the affairs of the cooperative and its dealings with others, Id. §32; and, in the event that the cooperative violates any provision of its certificate, or of law, or of the mortgage, or of any order of the Commissioner, the Commissioner has the power to remove all of the cooperative's directors and to replace them with his own designees, Id. §13(15)(c), and to commence an action in the Supreme Court of New York for the purpose of having such violations stopped and prevented, Id. §32(7), as amended, (McKinney Supp. 1972-73).

21. N.Y. Private Housing Finance Law §12(2-b), as amended (McKinney Supp. 1972-73).

22. N.Y. Private Housing Finance Law §31(2)(a), (b), as amended, (McKinney Supp. 1972-73).

23. N.Y. Private Housing Finance Law §§11, 31(7)(a), (b), as amended, (McKinney Supp. 1972-73).

Thus by definition, the tenants of Co-op City are persons of limited, and in some cases, fixed incomes. They secured their right to occupancy by completing a Subscription Agreement and Apartment Application form, wherein they agreed to subscribe to 18 shares of Riverbay common stock —at $25 par value per share—for each room in the apartment they selected. After their applications were screened and accepted by the State Division, they signed a three-year, non-proprietary Occupancy Agreement (lease), paid for or financed the purchase of their stock, and moved in as the buildings were completed and their apartments were ready for occupancy.

Beyond the face value of $25 per share and the right to occupancy, the Riverbay shares carry little, if any independent value or meaning. The Riverbay By-Laws provide that they may not be pledged or otherwise encumbered; the shares may descend intact, with the right to occupancy, only to a surviving spouse. The stock transaction is rescindable by either party. The shares may not be owned separate and apart from actual occupancy in Co-op City, and a tenant who wishes to move out—or who is forced out for violation of the lease, or because his income has increased beyond income limits—is required to divest himself of the stock. He must first offer the shares to the cooperative corporation for repurchase, and the By-Laws provide that he will be compensated for these shares with exactly the amount he paid for them. In the unlikely event that the corporation does not repurchase the shares,[24] only

24. Defendants have informed this Court that a reserve fund has been established for the repurchase of stock should drastic changes in economic conditions make it impossible to find buyers. The fund, as

[*footnote continued on next page*]

then is he free to sell the shares elsewhere and then the Mitchell-Lama Act provides that he may not sell them for more than the original purchase price, plus a fraction of the mortgage amortization which he has paid during his tenure at Co-op City.[25] It is implicit in the By-Laws and the Act that he may not sell to a person who does not meet the income and credit requirements for occupancy. Voting rights in the affairs of the cooperative corporation are not tied to the number of shares owned, which could vary greatly according to apartment size. Rather, to facilitate the democratic cooperative ideal, each apartment is allotted one vote.[26]

of December 31, 1972, totalled $917,338. Further, they say, Riverbay will exercise its option to repurchase the shares without tapping the reserve fund as long as there is a waiting list for Co-op City apartments. They have represented that there are approximately 7,000 families on the waiting list, and that the annual turnover is about 300 families.

In a supplemental affidavit filed September 4, 1973, plaintiffs have called this Court's attention to recent Riverbay advertisements in local newspapers, reopening the application list for two and three bedroom apartments. This indicates, they assert, that the waiting list consists of a disproportionate number of applications for one bedroom apartments and that the 7,000 figure submitted by defendants may be a distortion. Without characterizing the figure one way or another, it is clear from plaintiffs' submission that if the waiting list for certain types of apartments is growing short, then Riverbay is actively seeking to rebalance it in order to remain in a position to continue to exercise its option without using reserve funds.

25. N.Y. Private Housing Finance Law §31-a (McKinney, Supp. 1972-73).

26. At the present time, the control of Co-op City is still in the hands of the original amalgam which conceived and built it, and the tenant/shareholders do not as yet actually possess the stock certificates they have purchased, nor will they have any voting voice in the affairs of Riverbay until they do receive the certificates. Riverbay's Subscription Agreement and Apartment Application provides that

[*footnote continued on next page*]

Appendix B

The obligations of the Co-op City residents flow from the lease, not the stock. In addition to the usual landlord/tenant covenants with respect to services and care of the premises, the lease provides that the resident's financial commitment is to pay annual carrying charges, prorated in advance monthly payments. The apportionment is not based on the number of shares owned, but rather on other factors such as size, type and location of apartment. This monthly payment is, for all practical purposes, rent. It represents a proportionate allocation of all the expenses of Riverbay in connection with the construction, ownership, maintenance, operations and activities associated with the housing corporation. These include such items as taxes, mortgage indebtedness, repairs, improvements and wages for Riverbay employees.

It is the amount of these carrying charges for Co-op City apartments which is the stress-point in this litigation.

In May of 1967, CSI as sales agent for Riverbay began promoting the sale of shares which carried with them the concomitant right to reside in Co-op City. Construction was then underway, but nowhere near completion. The Information Bulletin circulated through the mails to prospective tenant/stockholders set forth an estimated average monthly carrying charge of $23.02 per room. Thus, assuming he met the income eligibility requirements, the prospect for a three-room apartment could expect to pay about

the stock shall not be distributed until such time as the Commissioner of the State Division issues a Certificate of Acceptability after the completion of the project. The Division apparently has the Certificate under advisement and it will be issued shortly, assuming that the project is found by the State Division to meet it standards.

Appendix B

$1,350 for stock in Riverbay and a monthly rent thereafter of $69.06. Persons familiar with the cost of housing in New York City can appreciate the incredible baragain Co-op City must have seemed to prospective tenant/stockholders. However, by the time the project was near completion, the bargain had somewhat diminished. In 1968, while the project was still under construction, the Information Bulletin estimate was revised to $25 per room, per month. Then in an unremitting upward spiral, the estimate was revised to $29.39 for 1970-72; to $35.27 for 1973-74; and it is now estimated that the charge will be $39.68 effective July 1, 1974. Thus, the $69.06 monthly rental bargain for a three-room apartment will soon cost $119.04 a month.[27] At the same time, of course, the maximum income eligibility limit, related as it is to carrying charges, has increased proportionately; and it may be assumed that to the extent the increases in carrying charges reflect the inflationary trend of the period, wages and salaries should have also risen proportionately. Thus, for tenants in the work force, it is possible that no real hardship has occurred.

But all of this is of little solace to the elderly and the handicapped, or anyone on a fixed or sluggish income,

27. Relatively speaking, Co-op City still offers one of the lowest rent structures of any Mitchell-Lama housing in New York City. This is due, at least in great part, to its low unit construction cost of $19,000 compared with the present Mitchell-Lama average of $40,000 per unit. In a case with similar underlying facts, commenced in the New York State courts, the estimated average monthly carrying charges had jumped from $51.35 per room in 1968 when the project was commenced, to $82.60 per room. People v. Cadplaz Sponsors, Inc., *supra,* note 10. It may be worth noting that the sponsors in that case were acquitted of criminal fraud charges in connection with the offering of stock in the cooperative corporation. N.Y. Times, July 10, 1973, p. 1, col. 1.

or indeed, anyone who arranged his affairs based on a belief that the earlier Co-op City estimates would remain unaffected by changes in the economy. The gravamen of the plaintiffs' complaint is that this is precisely what they were led to believe by misrepresentations and material omissions in the Information Bulletins. They point to the earliest Bulletin which indicated that there was a "lump sum" price of $258,678,000 fixed for the construction of the project, to be financed with a $250,000,000 mortgage from the Agency. The bulletin further stated that "the risk of completing the construction within the lump sum price is on the contractor." The final construction bill for Co-op City was $340,500,000, and the tenant/stockholders absorbed the impact, chiefly through a $125,000,000 increase in the mortgage loan from the Agency which consequently contributed greatly to the increase in carrying charges.[28] In addition to this alleged misrepresentation, plaintiffs assert that a number of other material facts were omitted from the Information Bulletins, all of which would have influenced their decision to purchase or not to purchase shares in the cooperative corporation.

28. Because of the procedural posture of the litigation the defendants have not as yet developed fully their side of the merits. However, it is well to point out here that other language in the Information Bulletins states that the lump sum price is subject to addition or deduction for change orders during the progress of the construction. Also, the Information Bulletins warn that "it is possible that increases in costs may increase the average monthly carrying charge somewhat above the [estimate]." Further, defendants argue that even if plaintiffs were misled, there could be no damages because under Riverbay By-Laws the tenant may withdraw from occupancy at any time and receive his stock purchase price back in full.

Since this Court is not called upon to rule on the merits here, and particularly in view of the conclusion this Court reaches as to this motion to dismiss, further detail with respect to the plaintiffs' specific charges or the defendants' answers would serve little purpose. But the Court is constrained to say that if ever there was a group of people who need and deserve full and careful disclosure in connection with proposals for the use of their funds, it is this type of group. By law, they would not be eligible for occupancy in Co-op City unless their financial resources were limited. The housing selection decision is a critical one in their lives. The cost of housing demands a good percentage of their incomes. Their savings are most likely to be minimal, and they probably don't have lawyers or accountants to guide them. Further, they are people likely to put a great deal of credence in statements made with respect to an offering by reputable civic groups and labor unions, particularly when the proposal is stamped with the imprimatur of the state.

However, the question before this Court is not whether the plaintiffs *should* be protected; rather, the question is whether or not they *are* protected by the federal securities laws.

The Legal Principles

Any analysis of this issue must begin with the language of the statutes which define the scope of the federal securities laws.

Section 3(a)(1) of the Securities Exchange Act of 1934 provides:

3. (a) When used in this title, unless the context otherwise requires—(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.[29]

The Securities Act of 1933 contains a definition of a "security" almost identical to that contained in the 1934 Act, and the Supreme Court has indicated that the definitions under either Act are, for these purposes, interchangeable.[30]

Beyond the bare itemization contained in each definitional section, the statutes themselves yield little in the way of elaboration as to the characteristics of an instrument intended to be covered by the securities acts. Legislative history directly to the point is sparse and somewhat cir-

29. 15 U.S.C. §78c(10).

30. Tcherepnin v. Knight, 389 U.S. 332, 335-336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967). See, S.Rep. 792, 73d Cong., 2d Sess. 14 (1934).

cular, confirming, for instance, that the definitional sections define "the term 'security' in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of security."[31]

However, there is a landmark Supreme Court case which sets forth a number of principles and tests which light this Court's way. The Court in S.E.C. v. Joiner Corp., 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943), did not attempt to rigidly classify the oil leases at issue there, rather it stated that the courts should construe the legislation in conformity with its dominating general purposes, *Id.* at 350-351, 64 S.Ct. 120 and decide whether these documents had the evils inherent in the securities transactions which it was the aim of the Securities Act to end. *Id.* at 349, 64 S.Ct. 120. Then, the Court went on to explain the definitional sections:

> In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well-settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such a "transferable share," "investment contract," and "in general any interest or instrument commonly known as a "security." * * * Instruments may be included with any of these definitions, as matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace.

31. H.R.Rep.No.85, 73d Cong., 1st Sess. 11 (1933).

> Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security.'" *Id.* at 351, 64 S.Ct. at 124.

The Court then stated that the "test * * * is what character the instrument is given in commerce by the terms of the offer, the plan of distribution and the economic inducements held out to the prospect," *Id.* at 352-353, 64 S.Ct. at 124, noting that while in some cases a document might be proved a security by proving the document itself, "[i]n others proof must go outside the instrument itself. * * *" *Id.* at 355, 64 S.Ct. at 125.

In a later case, S.E.C. v. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946) the Court stated explicitly what was implicit in *Joiner,* that in searching for the meaning and scope of the word "security" in the securities laws, form should be disregarded for substance and the emphasis should be on economic reality. *Id.* at 298, 66 S.Ct. 1100. See also, Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967).

The Riverbay Shares

What this means in the context of the Riverbay shares is that this Court must first determine whether or not the identifying characteristics of the Riverbay instruments, and the economic realities of the Riverbay transaction—the plan of distribution and the economic inducements held out

to the prospective purchasers—fit any of the items set forth in the statute; and, if not, then determine if Congress intended, nonetheless, to cover this type of transaction.

[2-5] Plaintiffs urge, in one branch of their argument, that inasmuch as "stock" is explicitly set forth as a "security" in the plain language of the statute, and the instruments purchased by the residents of Co-op City are called "shares of stock," they are, *a fortiori,* securities. They rely on the language set forth in S.E.C. v. Joiner Corp., *supra,* 320 U.S. at 351, 64 S.Ct. 120, where the Court notes that some instruments may be included as a matter of law if they answer to the name or description of a category in the securities law. Plaintiffs also cite the alternate holding in Tcherepnin v. Knight, *supra,* 389 U.S. at 339, 88 S.Ct. 548, which relies on the *Joiner* language to point out that the investment contract in *Tcherepnin* could have also qualified as "stock." This Court believes that a reading of the entire paragraph from *Joiner,* set forth in full, *supra,* along with the *Howey* refinement, makes it clear that this Court must, at a minimum, look through the name of an instrument to its essential characteristics and determine whether it fits the standardized, well-settled meaning of "stock." This is, in fact, what the Court did in *Tcherepnin,* and only after noting that the instrument was evidenced by a certificate and that payment of dividends were contingent upon an apportionment of profits did it identify the instrument as a "stock." Accepting the definition set forth in *Tcherepnin* as the well-settled meaning, it is clear that Riverbay shares do not fit because they do not represent any right to any apportionment of

tangible profits.[32] Therefore, this Court rejects plaintiffs' argument.[33]

[6-10] The Court in *Joiner* indicated that in cases where the instrument could not be proved a security on its face, "proof must go outside the instrument itself. * * *" S.E.C. v. Joiner Corp., *supra,* 320 U.S. at 355, at 125 of 64 S.Ct. Since this is the case here, the next area of inquiry

32. Plaintiffs also cite Movielab, Inc. v. Berkey Photo, Inc., 321 F.Supp. 806 (S.D.N.Y. 1970), aff'd. 452 F.2d 662 (2d Cir. 1971), where the district court, relying on the "plain meaning" principle of statutory interpretation, felt compelled to follow the "unequivocable and all embracing" statutory language that "[t]he term 'security' means any note . . . ." The Court of Appeals in affirming did not indicate that it felt bound by the name on the documents alone, but noted that the statutory language included "some notes at the very least" and held that the facts there presented brought those particular notes within ambit of the securities acts. Thus, with respect to the Riverbay "stocks" it is clear that the statutory language includes some "stock", but on these facts, not necessarily these "stocks." This Court has considered the decision in Stockton v. Lucas, 482 F.2d 979 (Em. App. 1973) wherein that court held that for purposes of the exemption from Phase I price controls, a share in a private New York City cooperative housing corporation was a "stock" within the definition developed under New York case law. That holding is not dispositive of the issue with respect to Riverbay shares for two reasons. First, federal law must govern on the question of whether shares constitute securities under the federal securities laws. Tcherepnin v. Knight, *supra,* 389 U.S. at 337-338, 88 S.Ct. 548. And second, the shares in *Stockton* were those of a private cooperative corporation, the shareholder had the right to retain the "stock" upon moving out, and thus the shares did, in fact, represent a right to the apportionment of the profits and the assets of the corporation.

33. The Court also rejects the defendants' argument that even if the plaintiffs' theory is valid, the "stock" in this case is not covered by the statute because the plaintiffs do not yet possess the certificates and, until the Commissioner of the State Division issues a Certificate of Acceptability, they are deemed to be neither stockholders or holders of any other equity obligation of the cooperative corporation. This is erroneous. The tenants of Co-op City have purchased, at the least, the right to own these shares, and that is enough under the statute, providing all other tests are met. 15 U.S.C. §78c(a)(13).

is into the substance of the transaction. It is to this area that the bulk of the arguments are directed.

Defendants urge first that the severe restrictions surrounding the owner's use of the stock are such that the shares fit none of the categories of instruments or transactions which Congress intended to be covered by the securities laws. Further they argue that the nonprofit economic realities surrounding it, and the public policy underlying it, coalesce to produce a unique transaction, far removed from the commercial world that Congress intended to regulate with the federal securities laws.

Plaintiffs contend that this Court, by applying some flexibility, could find that the major motivation for the purchase of Riverbay shares is the economic benefit to be gained and that such creates a securities transaction, if not as stock *qua* stock, then in some other form. Further they argue that the major thrust of Congress was to protect the investor and that it makes little difference whether or not the enterprise which induces him to part with his money is commercial or nonprofit.

For all the arguments set forth by both plaintiffs and defendants—technical, substantive, emotional, policy—it is well to note at the outset of this inquiry that it is the fundamental nonprofit nature of this transaction which in this Court's view is the insurmountable barrier to plaintiffs' claims in this federal court.[34]

34. The remainder of defendants' arguments may carry some weight in the aggregate, but are not persuasive or dispositive standing alone. It makes little difference whether or not the purchasers' motive could be said to be speculative. Tcherepnin v. Knight, *supra,* 389 U.S. at 345, 88 S.Ct. 548; S. E. C. v. Howey, 328 U.S. 293, 301,

[*footnote continued on next page*]

[11] Plaintiffs attempt to overcome this hurdle by tacitly recognizing that if the Riverbay transaction is a securities transaction at all, it is more likely to be an investment contract than any other. An investment contract is one of the few items on the statutory list which has a developed definition. The oft-cited test enunciated in S.E.C. v. Howey Co., *supra,* has been used in a line of Supreme Court cases finding that such a contract does exist. See S.E.C. v. Variable Annuity Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959); S.E.C. v. United Benefit Life Ins. Co., 387 U.S. 202, 87 S.Ct. 1557, 18 L.Ed.2d 673 (1967); Tcherep-

66 S.Ct. 1100, 90 L.Ed. 1244 (1946). Nor is it dispositive that the shareholder is severely limited in his dealings with his shares, or that he must first offer them back to the cooperative. *Cf.* Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed 2d 741 (1972); Collins v. Rukin, 342 F.Supp. 1282 (D.Mass.1972). Federal securities regulation is not precluded just because the enterprise is regulated by state or other federal law. *Cf.* S. E. C. v. Variable Annuity Co., 359 U.S. 65, 75, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959); S. E. C. v. United Benefit Life Ins. Co., 387 U.S. 202, 210, 87 S.Ct. 1557, 18 L.Ed.2d 673 (1967); S. E. C. v. Lake Havasu Estates, 340 F.Supp. 1318, 1322-1323 (D.Minn.1972). Nor is it dispositive that the shareholder can, at his option, withdraw from the transaction and receive back his original investment, or that the value of the shares does not fluctuate. Tcherepnin v. Knight, *supra,* 389 U.S. at 345, 88 S.Ct. 548. Nor does the fact that the shareholder is not given certain rights normally attributed to his status, such as proportionate voting rights, determine the final result. *Cf.* Tcherepnin v. Knight, *supra* at 344, 88 S.Ct. 548.

And finally, this Court sees little value in engaging in the argument as to whether the right to occupancy is an incident of stock ownership, or whether the ownership of these shares is incident to the right to occupancy. Although it is clear that the securities laws do not extend to the classic purchase of real estate, this is so because the transaction does not meet the full test developed to identify a stock or an investment contract, not because the underlying property is real rather than personal. S. E. C. v. Joiner Corp., 320 U.S. 344, 352, 64 S.Ct. 120, 88 L.Ed. 88 (1943); Roe v. United States, 287 F.2d 435, 437-438 (5th Cir.), cert. denied, 368 U.S. 824, 82 S.Ct. 43, 7 L.Ed.2d 29 (1961).

nin v. Knight, *supra.* The *Howey* definition of an investment contract contains three elements. First, there must be a transaction whereby a person invests his money in a common enterprise; second, he must invest with the expectation of profits; and third, the profits must come solely from the efforts of the promoter or a third party. S.E.C. v. Howey Co., *supra,* 328 U.S. at 298-299, 66 S.Ct. 1100.

With respect to the Riverbay shares there can be no serious argument as to the first and last requirements. The first, a common enterprise, is self-evident because the corporation is a cooperative. The third could be questioned in a small cooperative where the ideal of joint venture was a reality, but given the massive size of Co-op City it would be specious to argue that the cooperative ideal precludes the notion of management by third parties. Furthermore, the By Laws of Riverbay clearly vest absolute control in the hands of the promotors until the tenants receive their stock certificates. These have not yet been distributed, see note 33. Thus, at this time, the third element of the *Howey* test is met in fact, as well as in spirit.

It is on the second element—the expectation of profit—where plaintiffs' argument founders. *Joiner* instructs that this Court should look to the economic inducement offered by the promotor; *Howey* instructs that this Court should look go the expectation of the purchaser for profits. This Court has examined both and finds that none of the documents involved in this transaction—the Information Bulletins, the Subscription Agreement and Apartment Application, or the Occupancy Agreement—ever, once use material,

tangible profits as an inducement.[35] In fact, the Information Bulletins assert the contrary, impressing upon the potential purchaser the stability of environment to be achieved because the shares can not be used for speculation.[36] They also point out that a departing tenant is required to resell his shares to the corporation for no more and no less than the purchase price, thus assuring no gain and no loss.[37] Further, since these shares pay no dividends, contemplate no apportionment of any profits or assets or earnings of any kind, it is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce. These shares are incapable—by law and by-law—of producing any monetary or fungible return. It would go against the funda-

35. The only conceivable tangible benefit mentioned is the possibility of city, state and federal tax deductions available as a result of the tenants' payment of real estate taxes through their carrying charges. To the extent that this can be characterized as economic inducement, it suffices to note that it is an incident of real estate ownership, not securities ownership. See Eckstein v. United States, 452 F.2d 1036 (Ct.Cl.1971).

36. The Information Bulletins stress the non-profit nature of the enterprise and the corporations sponsoring it. The advantages of cooperative organizations are set forth, in part, in the following terms:

> "[I]t is a way to obtain decent housing at a reasonable price" . . . "[It is] designed to provide a favorable environment for family and community living" . . . "[It avoids the problems of private apartment dwelling] where the landlord's interest was financial gain" . . . "Living in a cooperative is like living in a small town. As a rule there is very little turnover in a cooperative." "It is being a part of a group working for common purposes to benefit all."

37. The Information Bulletin recognized that "the investment a person makes in a cooperative often represents a large share of his life savings. To insure the investment against a time when there might not be an applicant for the apartment a special reserve will be established."

mental purpose of the cooperative ideal and the Mitchell-Lama Act if it were otherwise.[38] And, the state law is replete with provisions to guard against the possibility of profits from these shares or from occupancy in Co-op City.[39] Finally, of course, because both the cooperative corporation, Riverbay, and its sponsor UHF, are organized on nonprofit structures, there could be no monetary gain from the operations of the corporations to distribute, even if it were allowed by law.

Plaintiffs, fully cognizant of the legal problems, advance two bases upon which this Court might find the "profit" element satisfied in this transaction.[40] First, they suggest that this Court follow Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 13 Cal.Rptr. 186, 361 P.2d 906 (1961) and read the tangible profit motive out of the *Howey* test.[41]

The *Silver Hills* case has come to stand for the theory that the requisite profit motive should be replaced with a

38. The beneficial purposes of the Mitchell-Lama Act would be ill-served if a tenant whom the State Division has screened for income and credit stability was to be free to transfer his stock and its inherent right to reside in Co-op City to the highest bidder, or could in other ways manipulate his interest to produce a personal profit. See notes 11-12, *supra*.

39. See notes 15-25.

40. Plaintiffs put forth a third basis which relies on the remote possibility that there will come a time when the reserve fund (see note 24) may be depleted, and the divesting stockholder would be free to dispose of his shares on the open market, presumably at the small profit allowed by the Mitchell-Lama Act (see note 25). This Court does not find this remote possibility enough to establish a profit motive in the purchase of the Riverbay shares. Even if it should occur, the amount of profit allowed by the legislature is de minimis.

41. Several commentators would be in accord. See Anderson, Cooperative Apartments in Florida: A Legal Analysis, 12 Miami L.Rev. 13 (1957); Long, An Attempt to Return "Investment Con-

[*footnote continued on next page*]

"risk capital" approach which holds that the investor is protected by the securities laws if he risks capital, whether or not he expects a monetary return on the capital. In *Silver Hills* the risk was for a lifetime membership in a country club, but it was a large risk in a shaky enterprise devoted to making a profit. Given the pervasive state support and supervision of Riverbay in the transaction at issue here, and the resultant zero capital risk because of the guarantee of a complete refund on the stock purchase price, and the essentially nonprofit nature of the enterprise, this would not seem to be the case for the first federal application of this California state securities theory.

Alternatively, plaintiffs suggest that even though no monetary profit was envisioned or possible from the Riverbay shares, the shares were sold and purchased with economic benefits in mind. They ask this Court to expand the definition of "profit" to include savings of money that might have otherwise gone for more expensive housing; or the social gain to be had in quality housing for minimal expense. Put another way, the profit expected by Co-op City residents was the invaluable hedge against the skyrocketing real estate market in New York City.

---

tracts" to the Mainstream of Securities Regulation, 24 Okla.L.Rev. 135 (1971); Zammit, Securities Law Aspects of Cooperative Housing, N.Y.L.J., Jan. 8, 1973, p. 1, col. 1; Note, Cooperative Housing Corporations and Federal Securities Laws, 71 Colum.L.Rev. 118 (1971); Note, The Economic Realities of a "Security": Is There a More Meaningful Formula, 18 Case W.Res. L.Rev. 367 (1967); Note, Cooperative Apartment Housing, 61 Harv.L.Rev. 1407 (1948); Comment, Sobieski, Securities Regulation in California: Recent Developments, 11 U.S.C.A.L.Rev. 1 (1963). But see, Miller, Cooperative Apartments: Real Estate or Securities, 45 Boston U.L.Rev. 465 (1965).

[12-14] This argument is most appealing to this Court, particularly when made on behalf of people with limited incomes who are not free economically to allocate a portion of their money to ordinary capital producing securities, however safe, and who are not in a position to risk their money in speculative schemes. But, of the few cases which counsel and this Court have managed to find where this concept of profit was a possible factor, only one on close analysis is near the point.[42] And its point, with respect to

---

42. Neither side has been able to cite to this Court any federal cases directly concerned with the narrow issue presented here. Plaintiffs have called this Court's attention to Davenport v. United States, 260 F.2d 591 (9th Cir. 1958), cert. denied, 359 U.S. 909, 79 S.Ct. 585, 3 L.Ed.2d 573 (1959), a criminal case where the court apparently accepted as a security, a share in an employment cooperative. But, the issue was not discussed or even raised in that case and this Court does not consider it authority on the question. This Court has found one other federal case, where the motivation of the purchaser was discussed in non-monetary terms. In S. E. C. v. American Foundation for Advanced Education of Arkansas, 222 F.Supp. 828 (W.D.La.1963), the transaction involved an annuity type scheme for a future education fund. The Court there said

> . . . the universal desire of parents to secure the advantages of higher education for their children and to offset whenever possible the increasing cost of such education, makes the application of the securities act emp' atically necessary here. Id. at 831.

However, in spite of the court's language, the substance of the transaction promised the purchaser $6,000 worth of future education for a $1,000 investment. Thus underlying the decision was a monetary inducement and expectation.

Plaintiffs have cited, as authority for their position, Ashton v. Thornley Realty Co., 346 F.Supp. 1294 (S.D.N.Y.1972), aff'd without opinion, 471 F.2d 647 (2d Cir. 1973). There the district court granted summary judgment to a private cooperative corporation on a securities fraud complaint, implicitly accepting the stock involved as "securities," although the question was never raised or discussed. Whether or not this case stands for some authority on the general issue of the stock of a cooperative housing corporation as a "security," it is clear from the facts that it was not a state-supported and super-

[*footnote continued on next page*]

a medical cooperative, was simply, "money saved is money earned." State ex rel. Troy v. Lumberman's Clinic, 186 Wash. 384, 58 P.2d 812, 816 (1936). As attractive as that reasoning may be, Supreme Court cases and the lower federal court cases which follow them closely, and legislative documents concerning the federal securities laws convince this Court that the weight of authority is against it. This Court has attempted to follow the guiding principle that federal securities laws, as remedial legislation, must be read liberally to effectuate the purpose of Congress. Tcherepnin v. Knight, *supra,* 389 U.S. at 336, 88 S.Ct. 548, and is mindful that to further the objectives of Congress, the securities laws must be viewed as embodying a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits. S.E.C. v. Howey Co., *supra,* 328 U.S. at 299, 66 S.Ct. 1100. Yet, it seems certain that Congress never intended to stretch the scope of the securities acts outside the commercial world and its fungible valuables, to the uncharted and unchartable realm of intangible, elusive personal values where one man's balm may very well be another's bane.

---

vised nonprofit corporation and that the possibility of monetary profit from sale of its stock was great. Therefore, it is not pertinent to the issues raised by the Riverbay stock.

Beyond these cases, every case cited by counsel for either side have involved only the general proposition that this Court should look through form to substance. In each there was no question but that the inducement was a monetary return; and in most the issue was the third-prong of the *Howey* test which is not at issue here. Therefore these cases are not helpful to determination of the specific question before this Court.

The legislative history of these acts, on the contrary, indicates that the intentions of Congress were focused on the powerful inducement of cold, hard cash and anything which could be converted to it through the commercial ingenuity of man. It is the abuse of this inducement, this motive, from which Congress believed investors needed protection, both for their well-being and for the health of the nation's commercial enterprises and its economy.[43]

---

43. This conclusion is based on the historical context of the legislation as a whole, but selected excerpts from Congressional documents serve to illustrate the point.
The House report on the Securities Act of 1933, describing the conditions which had precipitated the legislation, called attention to the "[a]lluring promises of *easy wealth* [which] were freely made with little or no attempt to bring to the investors' attention those facts essential to estimating the worth of any security." Then, referring to abuses in the real estate development field, the report condemned the ". . . creation of false and unbalanced values for properties whose *earnings* cannot conceivably support them." H.R.Rep.No.85, 73d Cong., 1st Sess. 2 (1933) (emphasis added). The report defines "securities" as the many types of instruments that *"in our commercial world"* fall with the ordinary concept of security. *Id.* at 11 (emphasis added).

The House report on Securities Exchange Act of 1934, states that

> The fundamental fact behind the necessity for this bill is that the *leaders of private business* . . . have not . . . been able to protect themselves by compelling a continuous and orderly program of *change in methods and standards of doing business* to match the degree to which the economic system has itself been constantly changing . . . changing in the proportion of the *wealth of the Nation invested in liquid corporate securities* . . .

H.R.Rep.No.1383, 73d Cong. 2d Sess. 3 (1934) (emphasis added). And the report continues with a discussion of the need for the legislation in terms of protecting the investor, increasing his confidence and thereby protecting the economy, and states that

> . . . *easy liquidity of the resources in which wealth is invested* is a danger rather than a prop to the stability of [the economic] system. *When everything everyone owns can be sold at once,* there must be confidence not to sell. . . . [A]s it becomes more liquid and complicated an economic system must become more moderate, more honest and more justifiably self-trusting.

Id. at 5 (emphasis added).

[15-17] Congress did not intend to sweep into the ambit of the federal securities laws, state-encouraged, nonprofit transactions made pursuant to a state emergency housing law and available only to state residents. And the mere fact that the state legislature chose to provide a form of organization common to the commercial world, in order to achieve critical public welfare goals, does not change that basic finding.[44] Clearly, the beneficiaries of the state legis-

44. It must be acknowledged that the exemptions from the registration provisions for charitable organizations in the 1933 Act, 15 U.S.C. §77c(4), and the 1934 Act. 15 U.S.C. §78*l*(g)(2)(D), plus the exemption for some cooperative associations in the latter, 15 U.S.C. §78*l*(g)(2)(E), (F), give some indication that Congress did not entirely ignore beneficial, nonprofit purposes in drafting the laws. However, the import of these exemptions is equivocal. It is settled that an exemption does not mean that the instrument or transaction or organization is exempt from the anti-fraud provisions of the Acts. 15 U.S.C. §77q(c); Tcherepnin v. Knight, *supra*, 389 U.S. at 342, 88 S.Ct. 548. But it is far from settled that a mere exemption indicates that Congress intended all instruments of the organizations exempted to be "securities" within the meaning of the Acts. Although the shares of a cooperative housing corporation are not included within the terms of any of these exemptions, plaintiffs attempt to make this technical argument, citing a Securities Exchange Commission (S.E.C.) Rule which does specifically exempt stock or other securities representing membership in any cooperative housing corporation with certain limiting provisos. Rule 235, 17 C.F.R. §230.235.
Professor Loss characterizes this as "too facile" an argument. 1 Loss, Securities Regulation, 493-94 (1961). This Court agrees, given the vagaries of political and social pressures likely to work upon a legislative body drafting regulatory acts such as this. See, e.g., H.R.Rep. No.1418, 88th Cong. 2d Sess. 11 (1964), wherein it is indicated that the cooperative association exemption was included at the behest of rural electrification cooperatives. See also, Hearings on H.R. 6789, H.R. 6793, S. 1642. Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 1st & 2d Sess., pt. 2, at 855-65 (1963-64).
Furthermore, this Court is, of course, not bound by any administrative determination of what is or is not a security, particularly when the Rule in question has never been tested in the courts and, as nearly

[*footnote continued on next page*]

lation should be protected from abuses, but it is this Court's view that in this instance, such protection must come from the state.

[18, 19] It is the plaintiffs' affirmative burden to show that their action has been properly brought in federal court. They have not met that burden with respect to this Court's jurisdiction under the federal securities laws. There being no other basis for federal jurisdiction, the counts of the amended complaint alleging violations of the federal securities laws are dismissed as to all defendants named therein. Further, since the federal securities allegations represent the only well-pleaded underlying basis for jurisdiction under the Civil Rights Act, count nine is dismissed as against the Agency. The remaining counts are dismissed as against the defendants named therein, inasmuch as they set forth pendent claims asserted pursuant to state law. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The complaint is therefore dismissed in its entirety for lack of subject matter jurisdiction.

So ordered.

as this Court can determine, has not been rigidly enforced by the S. E. C. See, Zammit, Securities Law Aspects of Cooperative Housing, *supra*. Finally, a recent release indicates that the S. E. C. itself has refined its thinking and is now seeking to narrow its interpretation of the scope of the securities acts to those housing enterprises where all three-prongs of the *Howey* test are present. S.E.C. Release #5347, Jan. 4, 1973, Fed.Sec.L.Rep. ¶79, 163 (Trans.Binder 1972-73).

Appendix C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June one thousand nine hundred and seventy-four.

Present:

Hon. PAUL R. HAYS,
Hon. JAMES L. OAKES, Circuit Judges
Hon. A. SHERMAN CHRISTENSEN, District Judge

73-2613

Milton and Ellen Forman, Earle and Patricia McFie'd, Michael and Phyllis Sicilian, Jack and Diane R. Blackin, Carl and Alma Trost, Robert and Pauline Carrington, Gilbert and Gloria Narins, Murray and Helene Victor, Jerome and Leonore Baer, Harold Asnin, Joseph S. and Wanda D. O'Connor, Abraham and Irene Kopolsky, Richard Ferguson, Hyman and Beatrice Fertel, Herman and Myra Ackerman, Bernard and Victoria Seinfeld, Frank and Hilda Glassman, Walter Simon, Thomas D. and Elsa A. MacLean, Melvyn and Gloria Plotzker, Fary and Charlotte Stern, Max and Bettina Schwarzhaupt, Herman B. and Rose Goldberg, Stephen and Juanita Reynolds, Arthur and Gertrude Lucker, Abraham and Henriette Schenck, Reginald and Zenobia Thomas, John Jr., and Elissa Pyatt, Albert L. and Rhoda Abrams, and Jack and Pearl Handschuh, individu-

[*title continued on next page*]

ally and on behalf of themselves and all others similarly situated, and in the right of Riverbay Corporation,

Plaintiffs-Appellants,

v.

Community Services, Inc., United Housing Foundation, The State of New York, The New York State Housing Finance Agency, Harold Ostroff, Robert Szold, Milton Altman, George Schecter, Anthony Marino, Paul Kramer, Irving Alter, Julius Goldberg and Riverbay Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York. and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

Appendix D

Statutes, Rule, and Release Involved

The statutes involved in this case are 15 U.S.C. §77b(1), §77q, §77v(a), §78c(a)(10), §78j(b), and §78aa, which provide as follows, in pertinent part:

15 U.S.C. §77b

"When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

15 U.S.C. §77q

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section."

15 U.S.C. §77v(a)

"(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took

place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts."

15 U.S.C. §78c(a) (10)

"(a) When used in this chapter, unless the context otherwise requires—

• • •

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

15 U.S.C. §78j (b)

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. §78aa

"The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered

shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

17 C.F.R. §240.10b-5

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Securities Act Release No. 5347, January 4, 1973.

"The Securities and Exchange Commission today called attention to the applicability of the federal securities laws to the offer and sale of condominium units, or other units in a real estate development, coupled with an offer or agreement to perform or arrange certain rental or other services for the purchaser. The Commission noted that such offerings may involve the offering of a security in the form of an investment contract or a participation in a profit sharing arrangement within the meaning of the Securities Act of

1933 and the Securities Exchange Act of 1934.[1] Where this is the case any offering of any such securities must comply with the registration and prospectus delivery requirements of the Securities Act, unless an exemption therefrom is available, and must comply with the anti-fraud provisions of the Securities Act and the Securities Exchange Act and the regulations thereunder. In addition, persons engaged in the business of buying or selling investment contracts or participations in profit sharing agreements of this type as agents for others, or as principal for their own account, may be brokers or dealers within the meaning of the Securities Exchange Act, and therefore may be required to be registered as such with the Commission under the provisions of Section 15 of that Act.

The Commission is aware that there is uncertainty about when offerings of condominiums and other types of similar units may be considered to be offerings of securities that should be registered pursuant to the Securities Act. The purpose of this release is to alert persons engaged in the business of building and selling condominiums and similar types of real estate developments to their responsibilities under the Securities Act and to provide guidelines for a determination of when an offering of condominiums or other units may be viewed as an offering of securities. Resort condominiums are one of the more common interests in real estate the offer of which may involve an offering of securities. However, other types of units that are part of a development or project present analogous questions under the federal securities laws. Although this release

1. It should be noted that where an investment contract is present, it consists of the agreement offered and the condominium itself.

speaks in terms of condominiums, it applies to offerings of all types of units in real estate developments which have characteristics similar to those described herein.

The offer of real estate as such, without any collateral arrangements with the seller or others, does not involve the offer of a security. When the real estate is offered in conjunction with certain services, a security, in the form of an investment contract, may be present. The Supreme Court in *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U. S. 293 (1946) set forth what has become a generally accepted definition of an investment contract:

> "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." (298)

The *Howey* case involved the sale and operation of orange groves. The reasoning, however, is applicable to condominiums.

As the Court noted in *Howey*, substance should not be disregarded for form, and the fundamental statutory policy of affording broad protection to investors should be heeded. Recent interpretations have indicated that the expected return need not be *solely* from the efforts of others, as the holding in *Howey* appears to indicate.[2] For this reason,

2. *SEC* v. *Glenn W. Turner Enterprises, Inc.*, CCH Fed. Sec. Law Rep. ¶93,605 (D.C. Ore. No. 72-390, May 25, 1972). See also *State* v. *Hawaii Market Center, Inc.*, 485 P. 2d 105 (1971) (cited in Securities Act Release No. 5211 (1971); and Securities Act Release No. 5018 (1969) regarding the applicability of the federal securities laws to the sale and distribution of whiskey warehouse receipts.

an investment contract may be present in situations where an investor is not wholly inactive, but even participates to a limited degree in the operations of the business. The "profits" that the purchaser is led to expect may consist of revenues received from rental of the unit; these revenues and any tax benefits resulting from rental of the unit are the economic inducements held out to the purchaser.

The existence of various kinds of collateral arrangements may cause an offering of condominium units to involve an offering of investment contracts or interests in a profit sharing agreement. The presence of such arrangements indicates that the offeror is offering an opportunity through which the purchaser may earn a return on his investment through the managerial efforts of the promoters or a third party in their operation of the enterprise.

For example, some public offerings of condominium units involve rental pool arrangements. Typically, the rental pool is a device whereby the promoter or a third party undertakes to rent the unit on behalf of the actual owner during that period of time when the unit is not in use by the owner. The rents received and the expenses attributable to rental of all the units in the project are combined and the individual owner receives a ratable share of the rental proceeds regardless of whether his individual unit was actually rented. The offer of the unit together with the offer of an opportunity to participate in such a rental pool involves the offer of investment contracts which must be registered unless an exemption is available.

Also, the condominium units may be offered with a contract or agreement that places restrictions, such as re-

quired use of an exclusive rental agent or limitations on the period of time the owner may occupy the unit, on the purchaser's occupancy or rental of the property purchased. Such restrictions suggest that the purchaser is in fact investing in a business enterprise, the return from which will be substantially dependent on the success of the managerial efforts of other persons. In such cases, registration of the resulting investment contract would be required.

In any situation where collateral arrangements are coupled with the offering of condominiums, whether or not specifically of the types discussed above, the manner of offering and economic inducements held out to the prospective purchaser play an important role in determining whether the offerings involve securities. In this connection, see *Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943). In *Joiner*, the Supreme Court also noted that:

> "In enforcement of [the Securities Act], it is not inappropriate that promoters' offerings be judged as being what they were represented to be." (353)

In other words, condominiums, coupled with a rental arrangement, will be deemed to be securities if they are offered and sold through advertising, sales literature, promotional schemes or oral representations which emphasize the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, in renting the units.

In summary, the offering of condominium units in conjunction with any one of the following will cause the offer-

ing to be viewed as an offering of securities in the form of investment contracts:

1. The condominiums, with any rental arrangement or other similar service, are offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter, from rental of the units.

2. The offering of participation in a rental pool arrangement; and

3. The offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit.

In all of the above situations, investor protection requires the application of the federal securities laws.

If the condominiums are not offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of others, and assuming that no plan to avoid the registration requirements of the Securities Act is involved, an owner of a condominium unit may, after purchasing his unit, enter into a non-pooled rental arrangement with an agent not designated or required to be used as a condition to the purchase, whether or not such agent is affiliated with the offeror, without causing a sale of a security to be involved in the sale of the

unit. Further a continuing affiliation between the developers or promoters of a project and the project by reason of maintenance arrangements does not make the unit a security.

In situations where commercial facilities are a part of the common elements of a residential project, no registration would be required under the investment contract theory where (a) the income from such facilities is used only to offset common area expenses and (b) the operation of such facilities is incidental to the project as a whole and are not established as a primary income source for the individual owners of a condominium or cooperative unit.

The Commission recognizes the need for a degree of certainty in the real estate offering area and believes that the above guidelines will be helpful in assisting persons to comply with the securities laws. It is difficult, however, to anticipate the variety of arrangements that may accompany the offering of condominium projects. The Commission, therefore, would like to remind those engaged in the offering of condominiums or other interests in real estate with similar features that there may be situations, not referred to in this release, in which the offering of the interests constitutes an offering of securities. Whether an offering of securities is involved necessarily depends on the facts and circumstances of each particular case. The staff of the Commission will be available to respond to written inquiries on such matters.

By the Commission."

APPENDIX

Supreme Court, U. S.
FILED
MAR 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,

Petitioners,

v.

MILTON FORMAN, *et al.*,

Respondents,

and

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

v.

MILTON FORMAN, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petition for Certiorari in No. 74-157 Filed August 22, 1974

Petition for Certiorari in No. 74-647 Filed November 22, 1974

Certiorari Granted January 20, 1975

TABLE OF CONTENTS

	PAGE
Docket Entries in United States District Court for the Southern District of New York	1
Docket Entries in the United States Court of Appeals for the Second Circuit	4
Amended Complaint	6
Notice of Motion of Defendants United Housing Foundation, *et al.*, to Dismiss the Amended Complaint	38
Notice of Motion of Defendants New York State and New York State Housing Finance Agency to Dismiss the Amended Complaint	40
Notation to the Place in the Petitions for Certiorari Where Are Printed the Decisions Below and the Judgment Sought to be Reviewed	42
Notation to the Place in the Petitions for Certiorari Where Is Printed the Order of the United States Court of Appeals for the Second Circuit Denying the Petition for Rehearing	42
Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc	43
Notation Regarding the Distribution of the Second Circuit Appendix to the Justices	43

Docket Entries in United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[72 Civ. 3980]

MILTON and ELLEN FORMAN, EARLE and PATRICIA MCFIELD, MICHAEL and PHYLLIS SICILIAN, JACK and DIANE R. BLACKIN, CARL and ALMA TROST, ROBERT and PAULINE CARRINGTON, GILBERT and GLORIA NARINS, MURRAY and HELENE VICTOR, JEROME and LEONORE BAER, HAROLD ASNIN, JOSEPH S. and WANDA D. O'CONNOR, ABRAHAM and IRENE KOPOLSKY, RICHARD FERGUSON, HYMAN and BEATRICE FERTEL, HERMAN and MYRA ACKERMAN, BERNARD and VICTORIA SEINFELD, FRANK and HILDA GLASSMAN, WALTER SIMON, THOMAS D. and ELSA A. MACLEAN, MELVYN and GLORIA PLOTZKER, GARY and CHARLOTTE STERN, MAX and BETTINA SCHWARTZHAUPT, HERMAN B. and ROSE GOLDBERG, STEPHEN and JUANITA REYNOLDS, ARTHUR and GERTRUDE LUCKER, ABRAHAM and HENRIETTE SCHENCK, REGINALD and ZENOBIA THOMAS, JOHN, JR. and ELISSA PYATT, ALBERT L. and RHODA ABRAMS, and JACK and PEARL HANDSCHUH, individually and on behalf of themselves and all others similarly situated, and in the right of RIVERBAY CORPORATION,

Plaintiffs,

against

COMMUNITY SERVICES, INC., UNITED HOUSING FOUNDATION, THE STATE OF NEW YORK, THE NEW YORK STATE HOUSING FINANCE AGENCY, HAROLD OSTROFF, ROBERT SZOLD, MILTON ALTMAN, GEORGE SCHECTER, ANTHONY MARINO, PAUL KRAMER, IRVING ALTER, JULIUS GOLDBERG and RIVERBAY CORPORATION,

Defendants.

Docket Entries

Date	Proceedings
Sep. 19-72	Filed complaint and issued summons
	• • •
Oct. 25-72	Filed Amended Complaint
Nov. 20-72	Filed Answer of New York State Finance Agency and State of New York LJL
	• • •
Dec. 14-72	Filed Answer of Riverbay Corp. to complaint.
Dec. 19-72	Filed Notice of Motion Ret. 1/2/73 at 10AM in Room 2601 re: dismiss amended complaint.
	• • •
Dec. 21-72	Filed Defts. State of NY & NYS Housing Finance Agency. Re: Dismiss Amended Complaint. Ret. 1/9/73.
	• • •
Apr. 1-73	Filed Supplemental Affidavit of George Berger to bring to the Court attention fact not aware. (for pltffs.)
	• • •
Apr. 6-73	Filed Notice of Cross Motion. Re: Summary Judgment, Amended Complaint, etc. ret. 2/6/73.
	• • •
Sep. 4-73	Filed Second Supplemental Affidavit by George Berger.
Sep. 6-73	Filed Opinion #39808 — The Complaint is therefore dismissed in its entirety for lack of subject matter jurisdiction. Pierce, J. (mailed notice)

Docket Entries

Date	Proceedings
Sep. 13-73	Filed Judgment. Ordered that defts. Community Services, Inc. et al. have judgment against the pltffs. Milton & Ellen Forman, et al., dismissing complaint in its entirety. Clerk. (mailed notice)
Oct. 3-73	Filed pltffs notice of appeal from order of dismissal dated 9-6-73—Mailed copies.
Oct. 3-73	Appeal Bond filed.
Oct. 17-73	Correcting Order filed by Judge Pierce.
	• • •

Docket Entries in the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPEAL FROM SOUTHERN DISTRICT

CASE No. 73-2613

[TITLE OMITTED IN PRINTING]

DATE	FILINGS—PROCEEDINGS
10-9-73	Filed copies of notice of appeal and docket entries
• • •	
12-28-73	Filed appendix, p/s
• • •	
4-4-74	Argument heard (By: Hays, Oakes, Christiansen)
6-12-74	Judgment reversed and remanded, Oakes, CJ
6-12-74	Filed judgment
• • •	
6-25-74	Filed petition for rehearing and rehearing en banc
6-28-74	Filed motion for a stay of the mandate pending application for a writ of certiorari, appellees, p/s
7-1-74	Filed affidavit in opposition to motion for a stay of the mandate, appellants, p/s

Docket Entries

DATE	FILINGS—PROCEEDINGS
7-2-74	Filed affidavit in reply to appellants affidavit in opposition to motion to stay the mandate, appellee, p/s
7-24-74	Filed order granting stay of mandate pending application for writ of certiorari (appellee)
8-22-74	Filed notice of filing of petition for writ of certiorari in Supreme Court (SC# 74-157)
9-9-74	Filed order denying petition for rehearing
9-9-74	Filed order denying petition for rehearing en banc
11-29-74	Filed notice of filing a petition for writ of certiorari (SC# 74-647)

Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Plaintiffs, by their attorneys, Phillips, Nizer, Benjamin, Krim & Ballon, complaining of defendants, allege:

JURISDICTION

1. Jurisdiction of this Court is based upon the Securities Laws of the United States, including, without limitation, sections 10, 20 and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b), 78t and 78aa, rule 10b-5 of the General Rules and Regulations under the Securities Exchange Act of 1934, 17 C.F.R. 240.10b-5, and sections 17(a) and 22(a) of the Securities Act of 1933, as amended, 15 U.S.C. §§77q(a) and 77v(a); The Civil Rights Act, 42 U.S.C. §§1983 and 1988, 28 U.S.C. §1343; 28 U.S.C. §1331; and jurisdiction pendent thereto. The amount in controversy exceeds $10,000 exclusive of interest and costs.

CLASS AND DERIVATIVE ACTION ALLEGATIONS

2. (a) Plaintiffs, all residents of the County of Bronx, State of New York, bring this action on their own behalf, as a class action on behalf of all other persons similarly situated, pursuant to Rule 23(b)(1)(B), (2) and (3) of the Federal Rules of Civil Procedure, and as a derivative action, pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, in the right and for the benefit of Riverbay Corporation ("Riverbay"). As alleged in paragraph 5, *infra*, Riverbay is the corporate owner of Co-op City, a cooperative housing development. There are approximately 15,372 subscribers to and beneficial owners of the common stock of Riverbay who constitute the members of the class herein. In some instances, title may be joint in the names of a husband and wife, but for purposes of this complaint, the ownership of each apartment unit is treated as a single member of the class.

(b) Plaintiffs, who are, and at the time of the transactions herein complained of were, subscribers to and the beneficial owners of said common stock (a security within the meaning of the Securities Laws of the United States) of an aggregate value in excess of $50,000, will fairly and adequately protect the interests of said class. The instant action was authorized by the Advisory Council of Co-op City, without dissent. Said Advisory Council is a 133-member body elected by all of the residents of Co-op City. The funds necessary to finance this action were obtained by small contributions from more than 12,000 members of the class. The plaintiffs named herein have been selected to present a representative cross-section of the entire community. All members of the class purchased their stock in reliance upon the representations referred to herein.

(c) The questions of law and fact under the class action counts common to the entire class are:

(1) Whether the Information Bulletin and revised Information Bulletin made misstatements of material facts and failed to state material facts which were necessary to make the representations contained within said bulletins not misleading.

(2) What defendants actually knew or should have known concerning said material facts at the time of the publication and circulation of said bulletins.

(3) Whether defendants became fiduciaries to plaintiffs and, if so, when did the fiduciary relationship arise.

(4) Whether the wrongs alleged in the First through Ninth Counts are actionable under the statutes cited or at common law.

(d) Conducting this litigation as a class action is superior to all other available methods of fair and efficient adjudication of this controversy, since:

(1) The members of the class are too numerous to permit the institution and prosecution of separate actions; the cost and expense of such individual actions by individual purchasers alone when weighed against the recovery obtainable, would be prohibitive to the point of constituting an actual bar to the bringing of such actions;

(2) To the best of plaintiffs' knowledge, this action is the only action against defendants for the wrongs herein complained of;

(3) All of the members of the class reside in the Southern District of New York and therefore it is desirable to have the litigation of the claims of the class determined in this forum;

(4) Having this litigation proceed as a class action will result in substantial convenience to defendants by avoiding a multiplicity of actions and thereby will also be in the best interests of efficient judicial administration;

(5) Adjudication with respect to individual members of the class would as a practical matter dispose of the interests of the other members of the class not parties to such adjudication or substantially impair or impede their ability to protect their interests;

(6) Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; and

(7) The difficulties likely to be encountered in the management of this action as a class action are certainly no greater than other cases of this nature which have heretofore been declared by this Court to be maintainable as class actions.

(e) This action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

THE PARTIES

3. Upon information and belief, defendant United Housing Foundation ("United") is a corporation organized and existing under the Not-for-Profit Corporation Law of the State of New York, which at all times mentioned herein was engaged, *inter alia,* in the sponsorship of middle-income cooperative housing.

4. Upon information and belief, defendant Community Services, Inc. ("Community") is a corporation organized and existing under the Business Corporation Law of the State of New York, which was used by United to build and sell middle-income cooperative housing sponsored by United.

5. Riverbay is a mutual company organized and existing under the Private Housing Finance Law of the State of New York (popularly called the Mitchell-Lama Act) for the purpose of owning and operating a middle-income cooperative housing development known as "Co-op City", comprising approximately 15,372 apartment units located in the County of Bronx, State of New York.

6. Defendant the State of New York ("State"), acting by and through the Commissioner of Housing and Community Renewal ("Commissioner") is required by the Mitchell-Lama Act to supervise the construction, sales and management of housing built pursuant thereto and is charged by said statute with the specific duty of preventing anything from being done which is improvident or prejudicial to the interest of the stockholders or the tenants of such housing.

7. Defendant the New York State Housing Finance Agency ("Agency") is a corporate agency of the State, created by the Mitchell-Lama Act, to help finance middle-income housing built pursuant to said Act by means of the sale of bonds and the making of mortgage loans.

8. Upon information and belief, defendants Harold Ostroff ("Ostroff"), Robert Szold ("Szold"), George Schechter ("Schechter") and Anthony Marino ("Marino") at all times mentioned herein were directors or officers, or both, of United.

9. Upon information and belief, defendants Ostroff, Szold, Milton Altman ("Altman"), Schechter, Marino, Paul Kramer ("Kramer"), Irving Alter ("Alter") and Julius Goldberg ("Goldberg") at all times mentioned herein were directors or officers, or both, of Community.

10. Upon information and belief, defendants Ostroff, Szold, Schechter, Kramer and Alter at all times mentioned herein were directors or officers, or both, of Riverbay.

11. Each of the individual defendants named in paragraphs 8 through 10, inclusive, is a "controlling person" within the meaning of the Securities Laws of the United States.

FIRST COUNT AGAINST ALL DEFENDANTS EXCEPT RIVERBAY

12. Prior to May, 1965, the defendants other than the State, the Agency and Riverbay, undertook to construct a cooperative housing development in Bronx County, New York, pursuant to the Mitchell-Lama Act. Pursuant to said undertaking, United caused Riverbay to be organized and applied to the State, acting by and through the Commissioner, for approval of a proposed development to be known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community to provide moderate-priced cooperative housing for people of limited means. Community was also to act as sales agent, soliciting and accepting subscriptions for the common stock of Riverbay, and to perform administrative services for Co-op City during construction and early occupancy. Thereafter, the State approved said application and defendants caused Riverbay to enter into a construction contract, a sales agency agreement and an administrative service agreement, all with Community and all dated June 18, 1965, which contract and agreements were approved by the State. In granting such approval, the State, acting by and through the Commissioner, expressly waived for Community the financial-responsibility pre-qualification theretofore promulgated by the Commissioner as a condition for approval of general contractors engaged by owners for construction of such housing projects.

13. Pursuant to the undertaking referred to in paragraph 12, defendants also caused Riverbay to enter into a building loan agreement with the Agency, dated July 15, 1965.

14. In accordance with the provisions of the Mitchell-Lama Act and in order to effectuate its purpose of providing moderate-priced housing for people of limited means,

the right to buy stock, and thus the opportunity of applying for said stock, was restricted to persons whose annual income did not exceed six times the estimated annual carrying charges (seven times in the case of families with three or more dependents) [Private Housing Finance Law §31].

15. Upon information and belief, commencing on or about May 12, 1965, United and Community and the individual defendants, with the approval and consent of the State, acting by and through the Commissioner, published and circulated and caused Riverbay to publish and circulate until on or about May 15, 1967, an "Information Bulletin" which was designed to interest the public in subscribing to and purchasing the common stock of Riverbay and which offered to sell said stock and expressly invited offers for such subscription and purchase.

16. The Information Bulletin purported to make true statements of certain material facts concerning Co-op City upon which defendants intended prospective purchasers to rely in deciding whether or not to invest all or a substantial part of their life savings in the purchase of Riverbay stock.

17. The Information Bulletin stated that the total estimated project cost of the Co-op City project was $283,695,550; that $32,795,550 of this amount was to be provided by stockholder-subscribers through the purchase of stock and/or other equity obligations; and that the balance was to be obtained by means of a $250,900,000 40-year, self-liquidating permanent loan to Riverbay from the Agency, secured by a first mortgage upon the land and buildings in Co-op City.

18. The Information Bulletin stated further that:

> "It is anticipated that the General Contractor for the construction of the project will be Community

> Services, Inc. of 465 Grand Street, New York 2, New York. The performance of certain sub-contracts to be made with the General Contractor will be insured by a surety company or companies in amounts to be approved by the Commissioner, in favor of the Housing Company [Riverbay], the General Contractor and the New York State Housing Finance Agency.
>
> • • •
>
> "The construction contract will be executed prior to the mortgage loan closing. The contract will provide for the payment of a lump sum price to the Contractor for the construction of the project, in the amount of $258,678,000, subject to addition or deduction for change orders during the progress of construction as approved by the Commissioner.
>
> "The contract price will include the sum of $2,000,000 for builder's home office overhead, but there will be no builder's fee. The risk of completing the construction within the lump sum price is upon the Contractor."

The Information Bulletin stated further that a copy of the construction contract was or would be made available for inspection by prospective purchasers and that they "should familiarize" themselves with it.

19. The construction contract between Community and Riverbay, dated June 18, 1965, provided for payment of a lump sum price of $258,507,750 for the construction of the project, including a flat fee of $2,000,000 for Community's "Home Office Overhead"; and, as to all items of construction cost other than said item of "Home Office Overhead", which items were specified in a schedule attached to the contract, the contract provided:

> "The Contractor [Community] guarantees payment for said items notwithstanding that the actual

cost for said items may exceed the amounts therein set forth."

20. The Information Bulletin stated further:

"Subject to the approval of the Commissioner, Community Services, Inc., of 465 Grand Street, New York, New York, has been retained by the Housing Company as sole agent for the sale of stock and/or other equity obligations and apartments in the project, at such fee as the Commissioner shall approve, not to exceed the amount shown in the schedule of the estimated project cost."

$450,000 was the amount shown in said schedule annexed to and made part of the construction contract.

21. The sales agency agreement between Community and Riverbay, dated June 18, 1965, provided that the total amount to be paid to Community would in no event exceed the sum of $450,000.

22. The Information Bulletin stated further that the average monthly carrying charge, required for the operation and maintenance of the project and the reduction of the mortgage loan, would be approximately $23.02 per room.

23. Upon information and belief, commencing on or about May 15, 1967, United and Community, with the approval and consent of the State, acting by and through the Commissioner, published and circulated and caused Riverbay to publish and circulate a revised "Information Bulletin" which, like the original Information Bulletin, was designed to interest the public in subscribing to and purchasing the common stock of Riverbay and, in fact, offered to sell such stock and included subscription agreement forms to be used by prospective purchasers thereof.

24. The revised Information Bulletin, like the original Information Bulletin, purported to make true statements of certain material facts concerning Co-op City, upon which defendants intended prospective purchasers to rely in deciding whether or not to invest all of a substantial part of their life savings in the purchase of Riverbay stock.

25. The revised Information Bulletin substantially reiterated the statements with respect to financing, construction and sales made in the original Information Bulletin and set forth in paragraphs 17, 18, 20 and 22 above, except that it stated:

(a) The total estimated development cost of the Co-op City project was $293,803,200, instead of $283,695,550;

(b) The amount of said development cost of the Co-op City project to be provided by stockholder-subscribers would be $32,803,200 instead of $32,795,550;

(c) The amount of the mortgage loan would be $261,000,000, instead of $250,900,000;

(d) The average monthly carrying charge would be approximately $25.00 per room, instead of $23.02;

(e) The lump-sum construction contract price was $267,830,750, instead of $258,507,750; and

(f) The fee to be paid to Community as sales agent would be $500,000, instead of $450,000.

26. On April 14, 1967, the construction contract between Community and Riverbay was modified, among other things, to increase the contract price from $258,507,750 to $267,830,750, and the sales agency agreement was modified

to increase the fee to be paid to Community from $450,000 to $500,000. The provisions of the contract and of the agreement in all other material respects were unchanged.

27. Plaintiffs received the Information Bulletin or the revised Information Bulletin, or both, and in reliance thereon subscribed to and paid for shares of common stock in Riverbay and thereafter entered into occupancy of apartments in Co-op City.

28. Upon information and belief, thousands of persons of limited means similarly received said Information Bulletins and in reliance thereon subscribed to and paid for shares of common stock in Riverbay and thereafter entered into occupancy of apartments in Co-op City.

29. Defendants engaged in acts, practices and a course of business which operated as a fraud and deceit upon the public in that they published and circulated, and caused to be published and circulated, as aforesaid, the Information Bulletin and the revised Information Bulletin, which omitted to state the material facts that the construction contract and the sales agency agreement would be modified from time to time so as to provide for payment to Community of increased compensation, and that a third agreement—the administrative service agreement between Community and Riverbay, dated June 18, 1965, providing for payment to Community of $200,000—was in existence and that such agreement would be modified from time to time so as to provide for payment to Community of increased compensation, which facts were necessary to make the representations set forth and referred in paragraphs 17, 18, 20, 22 and 25, above, not misleading, and which Information Bulletin and revised Information Bulletin contained representations which constituted untrue and deceptive statements of material facts, as hereinbelow alleged.

30. Upon information and belief, defendants never intended that Community would be required to adhere to the lump-sum contract price or that the risk of completing construction of Co-op City within the lump-sum price stated in the Information Bulletin and the revised Information Bulletin would be upon Community.

31. While the Information Bulletin and the revised Information Bulletin, as the case may be, were being published and circulated, the said representations made therein were false in that, with regard to those stockholder-subscribers who subscribed for their stock in sole reliance on the Information Bulletin: on April 14, 1967, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, but without notice to the then-existing and prospective stockholder-subscribers of Riverbay, and without changing the Information Bulletin, the lump-sum construction contract price was increased from $258,507,750 to $267,830,750, an increase of $9,323,000; and in that, with regard to all stockholder-subscribers, including those who subscribed for their stock on sole reliance on the Information Bulletin:

(a) On January 22, 1968, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, but without notice to the existing and prospective stockholder-subscribers of Riverbay, and without changing the revised Information Bulletin, the lump-sum construction contract price was increased again, from $267,830,750 to $268,080,750, an increase of $250,000 and an aggregate increase of $9,578,000 from the original contract price;

(b) On March 29, 1968, by agreement between Community and Riverbay, with the consent and ap-

proval of the State, acting by and through the Commissioner, but without notice to the then-existing and prospective stockholder-subscribers of Riverbay, and without changing the revised Information Bulletin, the lump-sum construction contract price was increased the third time, from $268,080,750, to $269,980,750, an increase of $1,900,000 and an aggregate increase of $11,478,000 from the original contract price.

(c) On October 9, 1969, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, but without notice to the then-existing and prospective stockholder-subscribers of Riverbay, and without changing the revised Information Bulletin, the lump-sum construction contract price was increased the fourth time, from $269,980,750 to $310,500,000, an increase of $40,519,250 and an aggregate increase of $51,997,250 from the original contract price.

(d) On July 7, 1971, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, but without notice to the then-existing and prospective stockholder-subscribers of Riverbay, and without changing the revised Information Bulletin, the lump-sum construction contract price was increased the fifth time, from $310,500,000 to $340,500,000, an increase of $30,000,000 and an aggregate increase of $81,997,250 from the original contract price of $258,507,750.

(e) Upon information and belief, Community, with the consent and approval of the State, acting by and through the Commissioner, but without notice to

the then-existing and prospective stockholder-subscribers of Riverbay, and without changing the Information Bulletin and revised Information Bulletin, waived sub-contractor's performance bonds.

(f) Upon information and belief, Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, but without notice to the then-existing and prospective stockholder-subscribers of Riverbay, and without changing said Information Bulletin and said revised Information Bulletin, increased the fee to Community for "Builder's Home Office Overhead" to $3,050,000 from the specified sum of $2,000,000, and said increased fee was included as an item of the increased construction contract price.

(g) The facts set forth in paragraphs 32, 33 and 34 had also occurred.

32. Because of and in addition to the increase in the price of the construction contract, the costs of related service fees were likewise increased by $2,510,000, without the knowledge or consent of plaintiffs, as follows:

(a) Architect's fees increased from $2,350,000 to $2,975,000;

(b) Engineer's and laboratory fees increased from $750,000 to $1,275,000;

(c) Surveyor's fees increased from $400,000 to $1,450,000;

(d) Legal fees increased from $150,000 to $210,000;

(e) Selling expenses (payable to Community) increased from $450,000 to $600,000;

(f) Administrative expenses (payable to Community) increased from $200,000 to $300,000.

33. By reason of the foregoing, the construction cost was increased $81,997,250 and related service fees were increased $2,510,000, for a total increase of $84,507,250. In order to provide funds to pay for said increases, defendants caused Riverbay to enter into several agreements with the Agency, without the knowledge or consent of plaintiffs, whereby the original mortgage loan to Riverbay was increased by an amount sufficient to cover the increases in construction cost and related services, as well as still further increases in financing costs incurred as a result of the increase in the amount of the mortgage loan itself. In requesting and approving and in granting said increases in the mortgage loan, the Commissioner and the Agency acted with full knowledge that said increases were contrary to and in violation of the representations contained in the Information Bulletin and the revised Information Bulletin and exceeded the authority of Riverbay.

34. The mortgage loan was increased from $236,655,710 to $375,755,710, and corresponding financing costs were increased by $66,624,000, as follows:

(a) Supervising governmental agency fees (New York State Department of Housing and Community Renewal) increased from $2,509,000 to $3,510,000;

(b) New York State Housing Finance Agency fees increased from $501,800 to $1,170,000;

(c) Title and recording expenses increased from $340,000 to $545,000;

(d) Interest, capitalized for the construction period, increased from $6,250,000 to $71,000,000.

35. In order to obtain the necessary monies to repay said increased mortgage loan, defendants, with the consent and approval of the State, acting by and through the Commissioner, caused Riverbay to increase the average monthly carrying charge levied on plaintiffs from an estimated $23.02 per room in 1965, to $25.00 in 1967, to $31.46 from July 1, 1970 through December 31, 1972, to $37.75 from January 1, 1973 through June 30, 1974, to $42.47 commencing July 1, 1974, all without the consent of the plaintiffs.

36. The eligibility limitations on purchasing stock in Riverbay set forth in paragraph 14 above, which made it impossible for those persons to become stockholder-subscribers of Riverbay who might otherwise have been able to afford to pay said increased carrying charges, compounded the economic hardship suffered by plaintiffs by reason of the said increases.

37. Upon information and belief, in or about October, 1968, with knowledge that the Information Bulletin and the revised Information Bulletin omitted to state material facts and that said Bulletin and revised Bulletin contained representations which were false and misleading, defendants attempted to obtain from the stockholder-subscribers of Riverbay a waiver of defendants' obligation to comply with the provisions of the Securities Laws of the United States, by creating and submitting to Riverbay's stockholder-subscribers a letter which purported to alert them to an unspecified increase in carrying charges in 1970-71 (but which did not refer to later and larger increases). Said letter falsely and misleadingly represented that such increase was "inevitable" by reason of, among other things, "construction cost increases", and deliberately omitted to state the fact that Community was obligated by its contract with Riverbay to pay such construction cost increases and that Riverbay was not so obligated.

38. Plaintiffs, and all persons similarly situated, have been damaged in that they paid approximately $32,000,000 for their shares of Riverbay common stock, and paid and will be obliged to pay carrying charges greatly in excess of the sums which it was represented in the Information Bulletin and the revised Information Bulletin that they would be required to pay.

39. Upon information and belief, the acts and transactions hereinabove alleged, which were not known or discovered by plaintiffs until 1972, directly and indirectly involved the use of a means or instrumentality of interstate commerce and of the mails in that copies of the Information Bulletin and of the revised Information Bulletin and the subscription agreements (referred to and contained therein) were distributed through the mails, and requests for said Bulletins and for subscription agreements were received and accepted by defendants over the telephone and through the mails.

SECOND COUNT AGAINST ALL DEFENDANTS EXCEPT RIVERBAY

40. Repeat and reallege each and every allegation contained in paragraphs 12 through 39 hereof with the same force and effect as if fully set forth herein.

41. Upon information and belief, the statements and representations set forth and referred to in paragraphs 17, 18, 20, 22 and 25 above were false and were known to defendants to be false when made, or were made recklessly, without knowledge of their truth or falsity, and were made with the knowledge that whoever might read or learn of said statements and representations, including plaintiffs, would rely thereon.

42. In reliance upon said statements and representations and believing the same to be true, plaintiffs subscribed to and paid for shares of said stock, sold or surrendered their prior homes or apartments, and entered into occupancy of apartments in Co-op City.

43. Upon information and belief, thousands of other stockholder-subscribers were similarly deceived and defrauded and, as a result of their belief in and reliance upon said false statements and representations, purchased shares of Riverbay common stock, sold or surrendered their prior homes or apartments, and entered into occupancy of apartments in Co-op City.

44. Plaintiffs, and all persons similarly situated, have been damaged in that they have paid approximately $32,000,000 for their shares of Riverbay common stock, and paid and will be obliged to pay carrying charges greatly in excess of the sums which it was represented that they would be required to pay and which they actually were obligated to pay under the original agreements.

THIRD COUNT AGAINST ALL DEFENDANTS EXCEPT RIVERBAY

45. Repeat and reallege each and every allegation contained in paragraphs 12 through 38 and paragraphs 41 through 44 hereof with the same force and effect as if fully set forth herein.

46. Upon information and belief, the acts and transactions hereinabove alleged were not known or discovered by plaintiffs until 1972.

47. Upon information and belief, in the light of all the circumstances, and the purpose of the Mitchell-Lama Act, said false statements and representations and the acts,

practices and course of business engaged in by defendants, hereinabove alleged, constituted a gross fraud aimed at the public, committed with wanton indifference to legal obligations and a reckless disregard for consequences, and involving a high degree of moral culpability.

FOURTH COUNT AGAINST ALL DEFENDANTS EXCEPT RIVERBAY

48. Repeat and reallege each and every allegation contained in paragraphs 12 through 38 and 46 hereof with the same force and effect as if fully set forth herein.

49. Upon information and belief, the statements and representations set forth and referred to in paragraphs 17, 18, 20, 22 and 25 were false, and defendants knew said statements and representations to be false when made, or with reasonable effort could have known the truth with respect to said statements and representations, or made no reasonable effort to ascertain the truth with respect thereto, or did not have knowledge concerning said representations and statements.

50. Said Information Bulletin and revised Information Bulletin were published and circulated by defendants to induce or promote the sale or purchase within or from the State of New York of securities as defined in Section 352 of the General Business Law of the State of New York.

51. Repeat and reallege each and every allegation contained in paragraphs 42, 43 and 44 hereof with the same force and effect as if fully set forth herein.

FIFTH COUNT AGAINST DEFENDANTS COMMUNITY, STATE, AGENCY, OSTROFF, SZOLD, ALTMAN, SCHECHTER, MARINO, KRAMER, ALTER AND GOLDBERG

52. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 12, 13, 19 and 21 hereof with the same force and effect as if fully set forth herein.

53. On June 18, 1965, defendants caused Riverbay to enter into an administrative service agreement with Community, which provided for the payment to Community of $200,000.

54. Upon information and belief, before and after May 12, 1965 numerous persons, all members of the class herein, subscribed to the common stock of Riverbay and paid thousands of dollars to Riverbay as down payments thereon.

55. By reason of the subscriptions and payments hereinabove alleged, defendants became fiduciaries to plaintiffs.

56. Upon information and belief, defendants thereafter breached said fiduciary obligations by knowingly causing Riverbay to pay and incur expenses for which it had no legal obligation and for which plaintiffs would be ultimately required to provide funds through increased carrying charges, as hereinbelow alleged.

57. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraph 26 hereof with the same force and effect as if fully set forth herein.

58. On January 22, 1968, by agreement between Community and Riverbay, with the consent and approval of the

State, acting by and through the Commissioner, the lump-sum construction contract price was increased again, from $267,830,750 to $268,080,750, an increase of $250,000 and an aggregate increase of $9,578,000 from the original contract price.

59. On March 29, 1968, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, the lump-sum construction contract price was increased the third time, from $268,080,750 to $269,980,750, an increase of $1,900,000 and an aggregate increase of $11,478,000 from the original contract price.

60. On October 9, 1969, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, the lump-sum construction contract price was increased the fourth time, from $269,980,750 to $310,500,000, an increase of $40,519,250 and an aggregate increase of $51,997,250 from the original contract price.

61. On July 7, 1971, by agreement between Community and Riverbay, with the consent and approval of the State, acting by and through the Commissioner, the lump-sum construction contract price was increased the fifth time, from $310,500,000 to $340,500,000, an increase of $30,000,000 and an aggregate increase of $81,997,250 from the original contract price of $258,507,750.

62. Upon information and belief, Community, with the consent and approval of the State, acting by and through the Commissioner, waived subcontractor's performance bonds.

63. Upon information and belief, Community and Riverbay, with the consent and approval of the State,

acting by and through the Commissioner, increased the fee to Community for "Builder's Home Office Overhead" to $3,050,000 from the specified sum of $2,000,000, and said increased fee was included as an item of the increased construction contract price.

64. Because of and in addition to the increase in the price of the construction contract, the costs of related service fees were likewise increased by $2,510,000, as follows:

(a) Architect's fees increased from $2,350,000 to $2,975,000;

(b) Engineer's and laboratory fees increased from $750,000 to $1,275,000;

(c) Surveyor's fees increased from $400,000 to $1,450,000;

(d) Legal fees increased from $150,000 to $210,000;

(e) Selling expenses (payable to Community) increased from $450,000 to $600,000;

(f) Administrative expenses (payable to Community) increased from $200,000 to $300,000.

65. By reason of the foregoing, the construction cost was increased $81,997,250 and related service fees were increased $2,510,000, for a total increase of $84,507,250. In order to provide funds to pay for said increases, defendants caused Riverbay to enter into several agreements with the Agency whereby the original mortgage loan to Riverbay was increased by an amout sufficient to cover the increases in construction cost and related services, as well as still further increases in financing costs incurred as a result of the increase in the amount of the mortgage loan

itself. In requesting and approving and in granting said increases in the mortgage loan, the Commissioner and the Agency acted with full knowledge that said increases were contrary to the original contract and agreements between Riverbay and Community and exceeded the authority of Riverbay.

66. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraph 34 hereof with the same force and effect as if fully set forth herein.

67. Plaintiffs, and all persons similarly situated, have been damaged in that they have paid and will be obliged to pay carrying charges greatly in excess of the sums which they would be required to pay had defendants not breached their fiduciary obligations to plaintiffs.

SIXTH COUNT AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF, SZOLD, SCHECHTER, MARINO AND GOLDBERG

68. Prior to May, 1965, the defendants other than the State, the Agency and Riverbay undertook to construct a cooperative housing development in Bronx County, New York, pursuant to the Mitchell-Lama Act. Pursuant to said undertaking, United caused Riverbay to be organized and applied to the State, acting by and through the Commissioner, for approval of a proposed development to be known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community to provide moderate-priced cooperative housing for people of limited means. Thereafter, defendants caused Riverbay to enter into a construction contract with Community dated June 18, 1965, which contract was approved by the State.

69. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 54 through 56 hereof with the same force and effect as if fully set forth herein.

70. Pursuant to the construction contract between Riverbay and Community, the construction costs of Co-op City chargeable to Riverbay could only be increased by reason of change orders for "additional or extra work" or decreased by reason of change orders for "work deleted."

71. Upon information and belief, defendants knowingly caused Riverbay to accept and pay for increased costs of construction which were not properly chargeable to Riverbay and they knowingly failed to obtain for Riverbay cost reductions for changes in the work for which a reduction should have been given.

72. Plaintiffs, and all persons similarly situated, have been damaged in that they have paid and will be obliged to pay carrying charges greatly in excess of the sums which they would be required to pay had defendants not breached their fiduciary obligations to plaintiffs.

73. By reason of the foregoing, plaintiffs have been damaged in a sum presently unknown to them but for which an accounting is required.

SEVENTH COUNT AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF, SZOLD, ALTMAN, SCHECHTER AND GOLDBERG

74. Prior to May, 1965, the defendants other than the State, the Agency and Riverbay undertook to construct a cooperative housing development in Bronx County, New York, pursuant to the Mitchell-Lama Act. Pursuant to

said undertaking, United caused Riverbay to be organized and applied to the State, acting by and through the Commissioner, for approval of a proposed development to be known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community to provide moderate-priced cooperative housing for people of limited means.

75. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 54 through 56 hereof with the same force and effect as if fully set forth herein.

76. Upon information and belief, notwithstanding that defendants knew there was no need to construct an electric power plant and had represented in the revised Information Bulletin that Riverbay would purchase its power requirements, defendants caused Riverbay to pay $27,200,000 to Community for the construction of an electric power plant and to pay further sums for the maintenance thereof, although electricity is in fact purchased from Consolidated Edison and paid for by plaintiffs by means of a separate charge over and above the monthly carrying charge.

77. Plaintiffs, and all persons similarly situated, have been damaged in that they have paid and will be obliged to pay additional carrying charges on account of said $27,200,000 which they would not have been required to pay had defendants not breached their fiduciary obligations to plaintiffs.

EIGHTH COUNT AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF AND SCHECHTER

78. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 74, 54 and 55 hereof with the same force and effect as if fully set forth herein.

79. Upon information and belief, defendants thereafter breached said fiduciary obligations as hereinbelow alleged.

80. Co-op City, when constructed, included certain space designed for occupancy by commercial tenants operating retail stores.

81. The rental income from said tenants is paid to Riverbay and is used by it to meet its obligations.

82. Upon information and belief, defendants knowingly caused some of said stores to be leased by Riverbay for less than a fair rental value and thereby deprived Riverbay of approximately $500,000 in rental income.

83. As a result thereof, plaintiffs, and all persons similarly situated, have been damaged in that they have paid and will be obliged to pay additional carrying charges aggregating approximately $500,000 which they would not have been required to pay had defendants not breached their fiduciary obligations to plaintiffs.

NINTH COUNT AGAINST DEFENDANT AGENCY

84. With respect to the defendant named herein, repeat and reallege each and every allegation contained in paragraphs 12 through 39 hereof with the same force and effect as if fully set forth herein.

85. The foregoing constitutes a deprivation by defendant, under color of statute, regulation, custom or usage of the State of New York, of the rights, privileges or immunities secured to plaintiffs by the Constitution and laws of the United States.

86. Plaintiffs have no adequate remedy at law.

TENTH COUNT ON BEHALF OF RIVERBAY AGAINST DEFENDANTS COMMUNITY, STATE, AGENCY, OSTROFF, SZOLD, ALTMAN, SCHECHTER, MARINO, KRAMER, ALTER, GOLDBERG AND RIVERBAY

87. At all times mentioned herein, defendants Community, United and State dominated and controlled Riverbay and selected its directors and officers. By reason thereof, the defendant named herein owed a fiduciary obligation to Riverbay.

88. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 12, 13, 19, 21 and 53 hereof with the same force and effect as if fully set forth herein.

89. Upon information and belief, defendants, in violation of their fiduciary obligations to Riverbay, thereafter wasted the assets of Riverbay as hereinbelow alleged.

90. With respect to the defendants herein, repeat and reallege each and every allegation contained in paragraphs 26, 58 through 65, and 34 hereof with the same force and effect as if fully set forth herein.

91. The performance by Riverbay of said contract and agreements, as modified, in the future, would constitute continuing wrongs to Riverbay.

92. Riverbay has no adequate remedy at law.

93. A demand upon Riverbay to institute an action against defendants has not been made inasmuch as Riverbay is dominated and controlled by defendants themselves and such a demand would therefore be futile.

ELEVENTH COUNT ON BEHALF OF RIVERBAY AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF, SZOLD, SCHECHTER, MARINO, GOLDBERG AND RIVERBAY

94. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 68, 87, 89, 70 and 71 hereof, with the same force and effect as if fully set forth herein.

95. By reason of the foregoing, Riverbay has been damaged in a sum presently unknown to it but for which an accounting is required.

96. A demand upon Riverbay to institute an action against defendants has not been made inasmuch as Riverbay is dominated and controlled by defendants themselves and such a demand would therefore be futile.

TWELFTH COUNT ON BEHALF OF RIVERBAY AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF, SZOLD, ALTMAN, SCHECHTER, GOLDBERG AND RIVERBAY

97. Prior to May, 1965, the defendants other than the State, the Agency and Riverbay undertook to construct a cooperative housing development in Bronx County, New York, pursuant to the Mitchell-Lama Act. Pursuant to said undertaking, United caused Riverbay to be organized and applied to the State, acting by and through the Commissioner, for approval of a proposed development to be

known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community to provide moderate-priced cooperative housing for people of limited means.

98. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 87 and 89 hereof with the same force and effect as if fully set forth herein.

99. Upon information and belief, notwithstanding the fact that Riverbay never intended to produce its own electric power and so represented in the revised Information Bulletin, defendants caused Riverbay to pay $27,200,000 to Community for the construction of an electric power plant and to pay further sums for the maintenance thereof, all to its damage in the further sum of at least $27,200,000.

100. A demand upon Riverbay to institute an action against defendants has not been made inasmuch as Riverbay is dominated and controlled by defendants themselves and such a demand would therefore be futile.

THIRTEENTH COUNT ON BEHALF OF RIVERBAY AGAINST DEFENDANTS COMMUNITY, STATE, OSTROFF, SCHECHTER AND RIVERBAY

101. Prior to May, 1965, the defendants other than the State, the Agency and Riverbay undertook to construct a cooperative housing development in Bronx County, New York, pursuant to the Mitchell-Lama Act. Pursuant to said undertaking, United caused Riverbay to be organized and applied to the State, acting by and through the Commissioner, for approval of a proposed development to be known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community to provide moderate-priced cooperative housing for people of limited means.

102. With respect to the defendants named herein, repeat and reallege each and every allegation contained in paragraphs 87 and 89 hereof with the same force and effect as if fully set forth herein.

103. Upon information and belief, defendants knowingly caused some of said stores to be leased by Riverbay for less than a fair rental value and thereby deprived Riverbay of approximately $500,000 in rental income, to the damage of Riverbay in the further sum of $500,000.

104. A demand upon Riverbay to institute an action against defendants has not been made inasmuch as Riverbay is dominated and controlled by defendants themselves and such a demand would therefore be futile.

WHEREFORE, plaintiffs demand judgment as follows:

1. Modifying and reducing the mortgage from Riverbay to the Agency to the extent that said mortgage exceeds a sum properly and lawfully chargeable to Riverbay.

2. Enjoining and restraining, permanently and during the pendency of this action, the collection of any carrying charges attributable to the amortization of, interest on and service fees relating to the portion of said mortgage which exceeds said sum.

3. Awarding damages against defendants in favor of plaintiffs for the sums paid by plaintiffs and to be paid by them as additional carrying charges to meet obligations imposed upon Riverbay by defendants which are in excess of the obligations represented to plaintiffs in the

Information Bulletin and the revised Information Bulletin and the original contracts entered into by Riverbay.

4. Awarding punitive damages against defendants in favor of plaintiffs in an amount to be determined.

5. Cancelling all agreements between Riverbay and defendants or any of them which require Riverbay to pay in the future any sums in excess of those sums it was obligated to pay under the original contracts entered into by Riverbay.

6. Requiring the defendants named in the Tenth and Eleventh Counts to account for and pay over to Riverbay all sums received by them from Riverbay in excess of the amounts which Riverbay was obligated to pay under the original contracts entered into by Riverbay.

7. Awarding damages against defendants in favor of Riverbay in an amount equal to all sums paid or required to be paid by Riverbay in excess of those sums it was obligated to pay under the original contracts entered into by Riverbay.

8. Awarding damages against the defendants named in the Twelfth Count in favor of Riverbay for at least $27,200,000 for the cost of the Co-op City electric power plant.

9. Awarding damages against the defendants named in the Thirteenth Count in favor of Riverbay for $500,000 for lost commercial rental income.

10. Awarding plaintiffs the costs and disbursements of this action, including reasonable counsel and accountants' fees.

11. Such other and further relief as to this Court may seem just and proper.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON

by s/ Louis Nizer

LOUIS NIZER
A Member of the Firm
477 Madison Avenue
New York, N. Y. 10022
(212) 758-6700

Attorneys for Plaintiffs

[Verification by Milton Forman Omitted]

Notice of Motion of Defendants United Housing Foundation, *et al.*, to Dismiss the Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Harold Ostroff, sworn to December 19, 1972, and the exhibits annexed thereto, and upon the Amended Complaint herein, the undersigned will move this Court before Hon. Lawrence W. Pierce, D.J., in Room 2601, United States Courthouse, Foley Square, New York, N. Y. on January 2, 1973 at 10:00 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the Amended Complaint in its entirety as against them on the ground that this Court lacks subject matter jurisdiction over the claims set forth therein.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c) of the General Rules of this Court, answering papers

and memoranda are required to be served at least three days before the return date of this motion.

Dated: New York, New York
December 19, 1972

Yours, etc.,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By s/ Martin London

Attorneys for Defendants
Community Services, Inc.,
United States Housing Foundation,
Harold Ostroff, Robert Szold,
Milton Altman, George Schechter,
Anthony Marino, Irving Alter,
Julius Goldberg and Paul Kramer
345 Park Avenue
New York, New York 10022
(212) 935-8000

s/ Alan G. Blumberg

ALAN G. BLUMBERG
Co-Attorney for Defendants
Robert Szold, Milton Altman and
Irving Alter
30 Broad Street
New York, New York 10004
(212) 422-1777

To:

[Names of Attorneys on Whom Served Omitted in Printing]

Notice of Motion of Defendants New York State and New York State Housing Finance Agency to Dismiss the Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that, upon all the papers heretofore filed herein, the undersigned will move this Court before Hon. Lawrence W. Pierce, D.J., in Room 2601 United States Courthouse, Foley Square, New York, New York on January 9, 1973, at 10 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the Amended Complaint herein in its entirety as against them on the ground that this Court lacks subject matter jurisdiction over the claims set forth therein; upon the ground that the defendants, State of New York and New York State Housing Finance Agency are not "persons" within meaning of the Civil Rights Act provisions set forth in the amended complaint; upon all the grounds set forth in the said defendants' answer sworn to November 7, 1972, and, as to the defendant State, more particularly, upon the ground set forth in the answer that the State of New York, one of the named defendants is immune from suit herein by reason of the provisions of the Eleventh Amendment to the Constitution of the United States.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 9(c) of the General Rules of this Court, answering papers

and memoranda are required to be served at least three days before the return date of this motion.

Dated: New York, New York
December 21, 1972

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
The State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
80 Centre Street
New York, New York 10013

By:

/s/ Daniel M. Cohen

DANIEL M. COHEN
Assistant Attorney General
Tel: (212) 488-3446

To:

[Names of Attorneys on Whom Served Omitted in Printing]

Notation to the Place in the Petitions for Certiorari Where Are Printed the Decisions Below and the Judgment Sought to be Reviewed

The opinion of the United States Court of Appeals for the Second Circuit is reprinted in the petition for writ of certiorari in No. 74-157 at Appendix A.

The opinion of the United States District Court for the Southern District of New York is reprinted in the petition for writ of certiorari in No. 74-157 at Appendix B.

The judgment of the United States Court of Appeals for the Second Circuit is reprinted in the petition for writ of certiorari in No. 74-157 at Appendix C.

Notation to the Place in the Petitions for Certiorari Where Is Printed the Order of the United States Court of Appeals for the Second Circuit Denying the Petition for Rehearing

The Order of the United States Court of Appeals for the Second Circuit Denying the Petition for Rehearing is reprinted in the petition for writ of certiorari in No. 74-647 at Appendix D.

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[Title Omitted in Printing]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN

s/ Irving R. Kaufman

Chief Judge

Notation Regarding the Distribution of the Second Circuit Appendix to the Justices

By agreement with the Clerk's office, copies of the Second Circuit Appendix are also being distributed for the convenience of the Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

73-2613

MILTON and ELLEN FORMAN, et al.,

Plaintiffs-Appellants,

v.

COMMUNITY SERVICES, INC., et al.,

Defendants-Appellees.

APPENDIX

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiffs-Appellants
Office & Post Office Address
477 Madison Avenue
New York, New York 10022
Telephone: (212) 758-6700

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Amended Complaint	9a
Answer of the State of New York and New York State Housing Finance Agency	57a
Notice of Motion to Dismiss Amended Complaint	62a
Affidavit of Harold Ostroff Sworn to December 19, 1972 - In Support of Motion to Dismiss	65a
Exhibits Annexed to Affidavit of Harold Ostroff	
Exhibit A - Certificate of Incorporation of United Housing Foundation, Inc....	95a
Exhibit B - Amended Complaint (Reproduced herein at pages 9a to 56a, supra.)...	99a
Exhibit C - Answer of the State of New York and the New York State Housing Finance Agency (Reproduced herein at pages 57a to 61a, supra.)	100a
Exhibit D - Notice of Potential Rent Increase	101a
Exhibit E - Subscription Agreement and Apartment Application .	104a
Exhibit F - Occupancy Agreement	108a

TABLE OF CONTENTS

PAGE

Exhibits Annexed to Affidavit of Harold Ostroff (Continued)

Exhibit G - By-Laws of Riverbay Corporation 120a

Exhibit H - Published Statement 138a

Notice of Motion by the Defendants, State of New York and New York State Housing Finance Agency, to Dismiss Amended Complaint 138a-1

Notice of Cross-Motion 139a

Affidavit of Jay F. Gordon Sworn to January 30, 1973 - In Opposition to Defendants' Motions and in Support of Cross-Motion 142a

Exhibits Annexed to Affidavit of Jay F. Gordon

Exhibit "1" - Letter dated February 4, 1972 ..... 158a

Exhibit "2" - 1965 Information Bulletin ... 159a

Exhibit "3" - 1967 Revised Information Bulletin 183a

Exhibit "4" - Construction Contract, dated June 18, 1965 ..... 201a

Exhibit "5" - Modification No. I of Construction Contract 215a

Exhibit "6" - Modification No. II of Construction Contract 221a

Exhibit "7" - Modification No. III of Construction Contract 225a

Exhibit "8" - Modification No. IV of Construction Contract 229a

TABLE OF CONTENTS

PAGE

Exhibits Annexed to Affidavit of Jay F. Gordon (Continued)

Exhibit "9" - Modification No. V of Construction Contract 237a

Exhibit "10" - Building Loan Agreement, dated July 15, 1965 ..... 244a

Exhibit "11" - Modification No. 1 of Building Loan Agreement . 258a

Exhibit "12" - Modification No. 2 of Building Loan Agreement . 269a

Exhibit "13" - Modification No. 3 of Building Loan Agreement . 286a

Exhibit "14" - Modification No. 4 of Building Loan Agreement . 300a

Exhibit "15" - Sales Agency Agreement, Dated June 18, 1965 ..... 316a

Exhibit "16" - Modification (No. I) of Sales Agency Agreement .. 322a

Exhibit "17" - Modification No. II of Sales Agency Agreement .. 326a

Exhibit "18" - Administrative Service Agreement, dated June 18, 1965 ..... 329a

Exhibit "19" - Modification (No. I) of Administrative Service Agreement 333a

Exhibit "20" - Modification No. II of Administrative Service Agreement 337a

TABLE OF CONTENTS

PAGE

Exhibits Annexed to Affidavit of Jay F. Gordon (Continued)

Exhibit "21" - Letter dated June 16, 1965, from Community to Mr. Paul Belica, Containing Hand-written Endorsement on the face thereof, with December 31, 1964 Unaudited Balance Sheet Attached 341a

Exhibit "22" - Letter dated June 18, 1965, from Community to New York State Division of Housing and Community Renewal 344a

Exhibit "23" - Letter dated June 18, 1965, from Riverbay to New York State Division of Housing and Community Renewal 345a

Exhibit "24" - Riverbay Rent Schedule and Equity Requirements, dated June 1, 1965 and Approved July 15, 1965 ..... 346a

Exhibit "25" - Schedules A & B, dated June 18, 1965 ..... 347a

Exhibit "26" - Schedules A, B & C, dated March 13, 1967 ..... 348a

Exhibit "27" - Schedule A and Financial Estimates, dated March 2º, 1968 ..... 350a

Exhibit "28" - Schedules A, B & C, dated September 15, 1969 ... 351a

TABLE OF CONTENTS

PAGE

Exhibits Annexed to Affidavit of Jay F. Gordon (Continued)

Exhibit "29" - Schedules A, B & C, dated May 1, 1971 ..... 353a

Exhibit "30" - Letter dated June 30, 1971, from Charles J. Urstadt, to Hon. Joseph H. Murphy, with Certified Copy of Resolutions of Riverbay's Board of Directors 362a

Exhibit "31" - Letter dated March 8, 1972, from Assistant Commissioner Hecht, to Mr. Harold Ostroff 365a

Affidavit of Milton Forman Sworn to January 30, 1973 - In Opposition to Defendants' Motions and In Support of Cross-Motion 367a

Exhibit A - Affidavit of Harold Ostroff - Re Hanks v. Urstadt 375a

Plaintiffs' Statement Pursuant to Rule 9(g) 378a

Plaintiffs' Amended and Supplementary Statement Pursuant to Rule 9(g) 387a

Reply Affidavit of Harold Ostroff Sworn to March 20, 1973 ..... 390a

Supplemental Affidavit of George Berger Sworn to March 28, 1973 In Support of Cross-Motion 395a

TABLE OF CONTENTS

	PAGE
Exhibit Annexed to Supplemental Affidavit of George Berger	
Exhibit 1 - Statement by Riverbay Corporation dated January 27, 1973	398a
Second Supplemental Affidavit of George Berger - Sworn to August 31, 1973 - In Support of Cross-Motion	399a
Exhibits Annexed to Second Supplemental Affidavit of George Berger	
Exhibit A - Advertisement, New York Post, August 25, 1973	402a
Exhibit B - Advertisement, New York Times, August 26, 1973	403a
Exhibit C - News Story, City News, August 30, 1973	404a
Opinion and Order by Pierce, J.	405a
Judgment Appealed From	446a

DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE PIERCE Jury Demand Date: 10/3/73 72 CIV. 3980

MILTON and ELLEN FORMAN, EARLE and PATRICIA McFIELD, MICHAEL and PHYLLIS SICILIAN, JACK and DIANE R. BLACKIN, CARL and ALMA TROST, ROBERT and PAULINE CARRINGTON, GILBERT and GLORIA NARINS, MURRAY and HELENE VICTOR, JEROME and LEONORE BAER, HAROLD ASNIN, JOSEPH S. and WANDA D. O'CONNOR, ABRAHAM and IRENE KOPOLSKY, RICHARD FERGUSON, HYMAN and BEATRICE FERTEL, HERMAN and MYRA ACKERMAN, BERNARD and VICTORIA SEINFELD, FRANK and HILDA GLASSMAN, WALTER SIMON, THOMAS D. and ELSA A. MacLEAN, MELVYN and GLORIA PLOTZKER, GARY and CHARLOTTE STERN, MAX and BETTINA SCHWARZHAUPT, HERMAN B. and ROSE GOLDBERG, STEPHEN and JUANITA REYNOLDS, ARTHUR and GERTRUDE LUCKER, ABRAHAM and HENRIETTE SCHENCK, REGINALD and ZENOBIA THOMAS, JOHN, JR. and ELISSA PYATT, ALBERT L. and RHODA ABRAMS, and JACK and PEARL HANDSCHUH, individually and on behalf of themselves and all others similarly situated, and in the right of RIVERBAY CORPORATION,

Plaintiffs,

-against-

COMMUNITY SERVICES, INC., UNITED HOUSING FOUNDATION, THE STATE OF NEW YORK, THE NEW YORK STATE HOUSING FINANCE AGENCY, HAROLD OSTROFF, ROBERT SZOLD, MILTON ALTMAN, GEORGE SCHECTER, ANTHONY MARINO, PAUL KRAMER, IRVING ALTER, JULIUS GOLDBERG and RIVERBAY CORPORATION,

Defendants.

Attorneys - For Plaintiff:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
477 Madison Avenue
New York City 10022 758-6700

For Defendant:

LOUIS J. LEFKOWITZ
80 Centre Street 10013
Defts' N.Y.S. & N.Y.S. HOUSING FINANCE AGENCY

Sullivan & Cromwell (for Riverbay Corporation)
48 Wall St. NY 10005

Paul, Weiss, Rifkind, Wharton & Garrison
(for defts. Community Services, Inc., United Housing Foundation, Harold Ostroff, Robert Szold, Milton Altman, George Schecter, Anthony Marino, Irving Alter, Julius Goldberg and Paul Kramer) 345 Park Ave. NY 10022

Alan G. Blumberg
(for Szold, Altman, Alter)
30 Broad Street, NYC 10004 422 1777

S.E.C. Act of 1934

DATE	PROCEEDINGS
Sep. 19-72	Filed complaint and issued summons
Oct. 2-72	Filed summons with marshal's ret. Served Community Services, Inc. by Anthony Marion, on 9-25-72. United Housing Foundation, by Anthony Marion, on 9-25-72, State of New York, Atty. General, by Mortimer Sattler, on 9-20-72, New York State Housing Finance Agency, by Frederick Lerens, on 9-21-72, Robert Szold, by M. Altman, on 9-21-72, Irving Alter by M. Altman on 9-21-72, Julius Goldberg by personally on 9-25-72, Milton Altman, by personally on 9-28-72,

	Riverbay Corp., by Herbert Schnederman, on 9-22-72, Harold Ostroff, by Herbert Schnederman, on 9-22-72, George Schechter, by Herbert Schnederman, on 9-22-72, Anthony Marino, by personally on 9-25-72 Paul Kramer, by Unabe to serve on 9-25-72
Oct. 20-72	Filed stip. and order that the time for all defts' except Paul Kramer, to answer complaint is ext. to 11-10-72: and the time for the pltffs' move for and order determining whether the action be maintained as a class action be, ext. to 12-20-72. Pierce, J.
Oct. 25-72	Filed Amended Complaint
Nov. 20-72	Filed ANSWER of New York State Finance Agency and State of New York LJL
Nov. 21-72	Filed Stip. and order that the time for defts' Community Services, Inc. and other certain defts' listed, to answer complaint is ext. to 12-4-72; and the time for defts' State of New York and New York State Housing Finance Agency answer complaint is ext. to 11-20-72, etc. Pierce, J.
Nov. 21-72	Filed additional summons with marshal's ret. Served; Paul Dramer, by Mrs. Kramer on 11-8-72
Dec. 12-72	Filed stipulation and order extending deft. Riverbay Corp.'s time to answer or make any motion to 12/26/72. So ordered. Pierce, J.
Dec. 14-72	Filed ANSWER of Riverbay Corp. to complaint.
Dec. 19-72	Filed Notice of Motion Ret. 1/2/73 at 10AM in ROOM 2601 re: dismiss amended complaint.

Dec. 19-72	Filed Memorandum of Law in support of motion to dismiss.
Dec. 19-72	Filed Notice of Motion Ret. 1/2/73 at 10 AM in ROOM 2601 re: Prohibit pltfs. as indicated.
Dec. 19-72	Filed Memorandum of Law in support of motion to prohibit unsupervised communications with their class.
Dec. 21-72	Filed Defts. State of NY & NYS Housing Finance Agency. Re: Dismiss Amended Complaint. Ret. 1/9/73.
Dec. 21-72	Filed Dfts. Brief in support of motion to dismiss amended complaint.
Dec. 22-72	Filed Stip & Order that the time for dfts. Community Services, Inc., United Housing Foundation, Harold Ostroff, Robert Szold, Milton Altman, George Schecter, Paul Kramer, Anthony Marino, Irving Alter, Julius Goldberg & Riverbay Corp., to answer to complaint is extended to 12/19/72. (Received 12/18/72)
Dec. 26-72	Filed Notice of Appearance for dfts. Robert Szold, Milton Altman & Irving J. Alter.
Jan. 16-73	Filed Stip & Order that the dfts. exeepty Riverby Corp. to dismiss amended complaint is adjourned to 1/23/73. So Ordered Pierce, J.
Jan. 16-73	Filed Stip & Order of agreement, seeking among other things, to restrain & enjoin the collection of a 20% increase in carrying charges proposed to take effect as of 1/1/73 and a 12 1/2% increase in carrying charges proposed to take effect as of 7/1/74, etc. Pierce J.

Jan. 23-73	Filed Stip & Order that motions for dfts. Community Services, Inc. & United Housing Foundation, Harold Ostroff, Robert Szold, Milton Altman, George Schechter, Anthony Marino, Paul Kramer, et al to dismiss complaint is adjourned to 2/6/73. etc. So Ordered, Pierce.
Feb. 9-73	Filed Stip & Order that the ret. dates of motions by all dfts. except Riverbay Corp. to dismiss the amended complaint, etc. be adjourned to 2/27/73. So Ordered Pierce, J.
Feb. 28-73	Filed Stip & Order that the motion to dismiss the complaint by dfts. be adjourned to 3/13/73. So Ordered, Pierce, J.
Mar. 7-73	Filed Opinion #39281. Dfts. motion for an Order pursuant to FRCP 23 is granted, etc. Pierce J. (mailed notice)
Mar. 7-73	Filed Opinion #39286. Rider #1 RE: (1 of Order dated 3/6/73, with respect to communication between attys. for pltffs & members of the Co-op City Advisory council; As set forth in the explanatory portion herein, this Order is not intended to require prior Court approval for communications which can be characterized as atty.-client communication; it is intended to control communication with actual & potential class members not formal parties; as indicated; The exception for the lawyer-client communications will be read narrowly, Among the factors to be considered are the content of the communication, the means of communication, the compensation & size of the audience for the communication. So Ordered Pierce J. (mailed notice)
Mar. 20-73	Filed Dft's Reply Affidavit to Pltffs. Memorandum of Law & affidavits.
Mar. 20-73	Filed Reply Memorandum in support of motion to dismiss.

Apr. 1-73	Filed Supplemental Affidavit of George Berger to bring to the Court attention fact not aware. (for pltffs.)
Apr. 1-73	Filed Pltffs, rebuttal Memorandum in Opposition to motion to dismiss for lack of subject matter jurisdiction.
Apr. 5-73	Filed Opinion #39383. Ordered that all persons & organizations bound by 3/6/73 order, may deliver as indicated; further ordered that the request of Co-op City Times to reprint Orders; etc. is granted; ETC. Pierce J (M/N)------Also Rider attached to opinion #39383. Copy of Order dated 3/6/73. Pierce J. For the duration of this order, all requests to communicate, whether they are characterized as specific proposed communications, ETC. must be presented to this court for formal motion with notice, & include a proposed order. Such motions may be made returnable on an accelerated time schedule, to wit, 4 days from date of personal service & filing. So Ordered Pierce J. (M/N)
Apr. 6-73	Filed Notice of Cross Motion. Re: Summary Judgment, Amended Complaint, etc. ret. 2/6/73.
Apr. 6-73	Filed Reply Affidavit by Martin London in opposition to pending motion to prohibit unsupervised communication with prospective members of the class.
Apr. 6-73	Filed Application to establish an orderly & equitable schedule for consideration & disposition of the motions pending in this action by Dfts.
Apr. 6-73	Filed Pltffs, memorandum of law in opposition to dfts. (except Riverbay's) motion to dismiss the amended complaint & in support of pltffs motion to grant class action, etc.

Apr. 6-73	Filed pltffs. Amended & supplementary statement pursuant to rule 9(g)
Apr. 6-73	Filed affidavit in opposition to motion under Rule 23 FRCP by Jay F. Gordon.
Sep. 4-73	Filed Second Supplemental Affidavit by George Berger.
Sep. 6-73	Filed Opinion #39808 - The Complaint is therefore dismissed in its entirety for lack of subject matter jurisdiction. Pierce, J. (mailed notice)
Sep. 13-73	Filed Judgment. Ordered that defts. Community Services, Inc. et al. have judgment against the pltffs. Milton & Ellen Forman, et al., dismissing complaint. in its entirety. Clerk. (mailed notice)
Oct. 3-73	Filed pltffs notice of appeal from order of dismissal dated 9-6-73 - Mailed copies.
Oct. 3-73	Appeal Bond filed.
Oct. 17-73	Correcting Order filed by Judge Pierce.
Oct. 30-73	Stipulation to include missing documents filed.
Oct. 30-73	Notice of Cross-Motion with attachments filed.
Oct. 30-73	Plaintiff's Memorandum of law in opposition filed.
Oct. 30-73	Clerk Certificate certifying record filed.
Oct. 30-73	Record in 2 volumes hand carried - Ct. of Appeals and filed. RSB

DOCKET ENTRIES

DATE	NAME OR RECEIPT NO.	REC.	DISB.
9/19/72	Phillips, N.	$15-	
9/20/72	U.S.M.	✓	$15-
10/3/73	Phillips, N.	5-	
10/4/73	Treas.		5-

AMENDED COMPLAINT PAGES 9a-56a

See page 6 of the printed appendix preceeding this Second Circuit Appendix.

ANSWER OF THE STATE OF NEW
YORK AND NEW YORK STATE
HOUSING FINANCE AGENCY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, appearing herein for the defendants, the State of New York and New York State Housing Finance Agency, in answer to the amended complaint, sworn to October 24, 1972, alleges:

FIRST: Denies the allegations of paragraph 1, insofar as it purports to set forth a basis for jurisdiction of plaintiffs' claims, particularly in relation to the defendants State of New York and the New York Housing Finance Agency.

SECOND: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the amended complaint numbered 2, 3, 4, 5, 8, 9, 10, 11, 13, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 64, 67, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 88, 93, 94, 95, 96, 97, 99, 100 and 104.

ANSWER OF THE STATE OF NEW
YORK AND NEW YORK STATE
HOUSING FINANCE AGENCY

THIRD: Denies the allegations of paragraphs 6, 7, 14, 36 and 47 of the complaint; and refers the Court, instead, to the specific terms of the statute therein referred to as the Mitchell-Lama Act.

FOURTH: Denies knowledge or information as to the truth of the allegations contained in the paragraphs of the amended complaint numbered 12, 15 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 53, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 74, 78, 79, 80, 81, 82, 87, 88, 89, 90, 91, 94, 95, 96, 98, 99, 101, 102 and 103, except that he denies the allegations therein which refer to the State and Agency; and refers to any written instruments referred to therein for the terms thereof.

FIFTH: Denies knowledge of information as to the truth of the allegations contained in paragraph 50; except that he refers to General Business Law, § 352 for the terms thereof.

SIXTH: Denies the allegations of paragraphs 86 and 92 of the complaint.

BEST COPY AVAILABLE

FOR A FIRST AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

SEVENTH: Defendants, State of New York, and New York State Housing Finance Agency, are not subject to the jurisdiction of this Court in this action.

FOR A SECOND AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

EIGHTH: The said defendants are not "persons" within the meaning of the Civil Rights Act provisions which the plaintiffs set forth as a basis for jurisdiction.

FOR A THIRD AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

NINTH: Any claims for damages predicated upon the allegations set forth in the complaint against the State should be presented for determination to the New York Court of Claims.

FOR A FOURTH AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

TENTH: The State of New York and its Housing Agency are immune from suit herein by reason

of the provisions of the Eleventh Amendment to the Constitution of the United States.

FOR A FIFTH AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

ELEVENTH: Denies that the defendants, State of New York and the State Agency ever issued any securities or that they constitute persons subject to the terms and provisions of Securities Exchange Act of 1934, §§ 10, 20 and 27 or any of the other provisions of the Securities Exchange Acts of 1933 or 1934 or the rules and regulations promulgated thereunder referred to in paragraph 1 of the amended complaint.

TWELFTH: Denies that the State or the Agency constitute persons within the meaning of the Civil Rights Act provisions set forth in paragraph 1 of the amended complaint.

FOR A SIXTH AFFIRMATIVE AND
COMPLETE DEFENSE, ALLEGES:

THIRTEENTH: This Court lacks subject matter jurisdiction over this action.

ANSWER OF THE STATE OF NEW YORK AND NEW YORK STATE HOUSING FINANCE AGENCY

FOR A SEVENTH AFFIRMATIVE AND COMPLETE DEFENSE, ALLEGES:

FOURTEENTH: The complaint fails to state a claim upon which relief can be granted.

FOR AN EIGHTH AFFIRMATIVE AND COMPLETE DEFENSE, ALLEGES:

FIFTEENTH: The claims herein are barred in whole or in part by applicable statutes of limitations.

FOR A NINTH AFFIRMATIVE AND COMPLETE DEFENSE, ALLEGES:

SIXTEENTH: The complaint fails to join herein indispensable parties.

WHEREFORE, judgment is prayed that the amended complaint herein be dismissed as to the defendants State of New York and New York State Housing Agency.

[Duly Verified by Daniel M. Cohen on November 17th, 1972]

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
By s/ Daniel M. Cohen
DANIEL M. COHEN
Assistant Attorney General of the State of New York
Attorney for Defendants State of New York and New York State Housing Finance Agency

DEFENDANTS' NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Harold Ostroff, sworn to December 19, 1972, and the exhibits annexed thereto, and upon the Amended Complaint herein, the undersigned will move this Court before Hon. Lawrence W. Pierce, D.J., in Room 2601, United States Courthouse, Foley Square, New York, N. Y. on January 2, 1973 at 10:00 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the Amended Complaint in its entirety as against them on the ground that this Court lacks subject matter jurisdiction over the claims set forth therein.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c) of the General Rules of this Court, answering papers and memoranda are required to be served at least three days before the return date

of this motion.

Dated: New York, New York
December 19, 1972

Yours, etc.,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

By s/ Martin London
Attorneys for Defendants Community
Services, Inc., United States
Housing Foundation, Harold Ostroff,
Robert Szold, Milton Altman, George
Schecter, Anthony Marino, Irving
Alter, Julius Goldberg and Paul Kramer
345 Park Avenue
New York, New York 10022
(212) 935-8000

s/ Alan G. Blumberg
ALAN G. BLUMBERG
Co-Attorney for Defendants
Robert Szold, Milton Altman
and Irving Alter
30 Broad Street
New York, New York 10004
(212) 422-1777

TO: PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Plaintiffs
477 Madison Avenue
New York, New York 10022

SULLIVAN & CROMWELL
Attorneys for Defendant Riverbay Corporation
48 Wall Street
New York, New York 10005

DANIEL COHEN, ESQ.
Assistant Attorney General
State of New York
Attorney for State of New York
and New York State Housing Finance Agency
80 Centre Street
New York, New York 10003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HAROLD OSTROFF, being duly sworn, deposes and says:

1. I am a defendant in this action as well as President and a director of Riverbay Corporation, Executive Vice-President and a director of United Housing Foundation and President and a director of Community Services, Inc., all of which are named defendants herein. Since 1964, I have been closely involved in the planning, construction and operation of Co-op City, a low and low-middle income, state-financed cooperative housing development in the Bronx built under the New York State Private Housing Finance Law. Accordingly, I am fully familiar with the matters set forth in this affidavit, which I submit in support of the accompanying motion for an order dismissing the Amended Complaint for lack of subject matter jurisdiction.

A

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

2. Plaintiffs seek to invoke the jurisdiction of this Court by alleging in the First Count of the Amended Complaint that the defendants violated the anti-fraud provisions of the 1933 Securities Act and the 1934 Securities Exchange Act in their issuance of an allegedly misleading "Information Bulletin" to prospective residents of Co-op City. This claim is premised on the unstated assumption that the plaintiffs have purchased or subscribed for "securities" within the scope of the 1933 and 1934 Acts. As set forth in detail below, however, the plaintiffs have not purchased or subscribed for "securities" as defined or intended by the Federal Securities Acts. In short, plaintiffs' claim does not relate to "securities" cognizable by federal law and should neither have been brought in this Court nor used to bring before this Court 11 state law claims which properly belong in the State Court.

The Parties

3. The named plaintiffs are all residents of Co-op City. They allege claims individually, representatively on behalf of all of the more than 15,000 apartment owners in Co-op City and

derivatively on behalf of Riverbay Corporation, the Housing company which owns Co-op City.

4. Defendant United Housing Foundation, Inc. ("U.H.F.") is a non-profit corporation comprised of housing cooperatives, civic groups, labor unions and other non-profit organizations. Its primary purpose is to foster the growth of non-profit cooperative housing for low and low-middle income families. A copy of U.H.F.'s Certificate of Incorporation is annexed hereto as Exhibit A. Since its formation in 1951, U.H.F. has sponsored the largest and most successful cooperative housing developments in the City of New York. In addition to Co-op City, the largest apartment development in the United States, it has sponsored Rochdale Village in Queens, Amalgamated Warbasse Houses in Brooklyn, Penn Station South, Seward Park Houses and East River Houses in Manhattan and Amalgamated Houses in the Bronx, among others.

5. Defendant Community Services, Inc. ("C.S.I.") is a subsidiary of U.H.F. engaged as a general contractor and sales agent for U.H.F.

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

sponsored projects. Defendant Riverbay Corporation ("Riverbay") is the cooperative housing company organized by U.H.F. to own and operate Co-op City under the Mitchell-Lama law. The individual defendants named by plaintiffs are some of the officers and/or directors of U.H.F., C.S.I. and Riverbay.

6. Finally, plaintiffs have named the State of New York (the "State") and the New York State Housing Finance Agency (the "Agency") as defendants. The State, through its Division of Housing and Community Renewal, supervises the development, construction and operation of housing built under the Mitchell-Lama Law. The agency provides the necessary financing through its issuance of bonds secured by first mortgages on the housing developments.

The Pleadings

7. The original complaint in this action was filed on September 19, 1972. It contained six counts, one alleging violations of the federal securities laws and the remaining five alleging violations of the common law of the State of New York. Then, on October 24, 1972, plaintiffs served

an Amended Complaint setting forth 13 separate counts. As in the earlier complaint, only one count alleges violations of the Federal Securities Laws; ten are refinements of five earlier counts and two are entirely new. A copy of the Amended Complaint is annexed hereto as Exhibit B.

8. The basic claim set forth in the Amended Complaint is that the defendants misled subscribers for apartments in Co-op City by failing to disclose the full extent of construction costs of the development which would be borne by Riverbay and, ultimately, the residents through increased maintenance charges. Riverbay, they charge, has been improperly obligated by the defendants to pay approximately $110,000,000 more than originally intended or represented and the residents, accordingly, are now obligated to pay monthly maintenance charges in excess of what they originally contemplated.

9. The first count in the Amended Complaint sets forth this charge in the form of an alleged violation of the antifraud provisions of the Federal Securities Laws. Specifically, the plaintiffs allege that they purchased "securities"

in Riverbay on the basis of an "Information Bulletin" issued by Riverbay which contained false and deceptive representations with respect to potential increases in construction costs. Significantly, however, plaintiffs do not allege that the "securities" purchased are worth any less than what they paid for them.

10. With the exception of count nine, which is not here relevant,* the remaining 11 counts variously charge that the defendants engaged in fraudulent conduct and violated fiduciary duties and obligations owed to plaintiffs. All of these 11 counts are based upon alleged violations of State common and statutory law, jurisdiction for which is allegedly pendent to the federal claim alleged in count one.

11. On November 20, the State and the Agency served an answer denying the material allegations contained in the Amended Complaint and interposing a number of affirmative defenses, including the defense upon which this motion is based.

* Count 9 charges the New York State Housing Finance Agency with unspecified violations of plaintiffs' civil rights. None of the other defendants is included or even mentioned in that count.

A copy of that answer is annexed hereto as Exhibit C. The remaining defendants have, by stipulation, extended their time to move or answer through December 19.

Background

The Planning and Construction of Co-op City

12. The merits of this action are not before the Court on this motion. However, in order to provide the Court with a better understanding of the nature of the so-called "securities" subscribed to by plaintiffs, I would like briefly to review the facts surrounding the planning and construction of Co-op City.

13. Co-op City was conceived in 1964. It was at that time that responsible government officials, including the Governor of New York and the Mayor of New York City, decided that a large tract of land in the Bronx on which William Zeckendorf's Freedomland formerly stood would be an appropriate site for a massive low and low-middle income housing development. Not surprisingly, the non-profit U.H.F. was the vehicle to turn their vision into a reality.

14. Co-op City, as planned, constructed and operated, was and is a joint enterprise of the State, the City and U.H.F. Pursuant to the

Mitchell-Lama law, the State approves and supervises all aspects of the construction and operation of the development; the Agency provides the mortgage funds;* and the City provides partial tax abatements and required rezoning, remapping of streets and other municipal facilities.

15. In this enterprise the State plays an active supervisory role. All plans, budgets, contracts and other matters relating to the planning, construction and maintenance of the project are submitted to the Division of Housing and Community Renewal for review by the Commissioner's staff. Financial computations are submitted to his department of audit and finance. Construction estimates are submitted to his department of construction and there divided among his architectural, engineering and other departments. Insurance matters are referred to his insurance department, maintenance and operating

*The residents purchased their apartments at a price of only $450 per room, for a total of $32,699,700, as compared with a mortgage loan from the Agency of $375,775,710. The purchase price was not increased at any time and remains the same today.

costs go to the management departments and legal matters are sent to the office of his general counsel. These departments conduct thorough and on going reviews of all such matters and, on the basis of their recommendations, the Commissioner determines the propriety of practically every dollar spent. He also reviews and approves the initial carrying charge levels and all increases therein.

16. Preliminary planning between U.H.F., the State and the City took more than a year. Finally, on July 14, 1965, Riverbay Corporation, which had been organized by U.H.F., with the consent and approval of the State, to own and operate the development, purchased the Freedomland site for approximately $20 million, obtained mortgage funds from the Agency and commenced construction.

17. To guide Riverbay through the completion of construction and occupancy of the project, U.H.F. -- with the approval of the State -- designated a group of directors. These included, among others, Jacob Potofsky, President of the Amalgamated Clothing Workers Union; Louis Stulb erg, President of the International Ladies Garment Workers Union; Gerald

Coleman, now a member of the New York City Planning Commission and formerly Executive Secretary of the United Hatters, Hat & Millinery Workers Union; Albert Shanker, President of the United Federation of Teachers, and myself.

18. This group of directors so selected by U.H.F. was charged with the responsibility of steering Riverbay through years of intense planning and massive construction. More importantly, they were all singularly dedicated to produce, with not a cent of profit to anyone, the best possible housing at the lowest possible prices. This goal has been met. The quality of the housing at Co-op City is world renowned and the carrying charges remain substantially lower than housing currently being built or recently completed under the Mitchell-Lama program. Commissioner Urstadt of the State Division of Housing and Community Renewal recently noted that Mitchell-Lama housing now costs approximately $40,000 per unit.* This is to be contrasted with the $19,100 average unit cost for Co-op City.** Indeed, Co-op City's cost of

* The New York Times, November 26, 1972, Sec. 8, p. 1.
**If costs of land, landscaping, garage and commercial space are included, the per unit figure would be $27,206.

construction was less than that of public housing projects, although the quality of the housing at Co-op City is far superior.

The Increases in Construction Costs and Carrying Charges

19. At the core of this case is the complaint by the residents that they are paying monthly carrying charges in excess of what was originally estimated. This is so. Original estimates in 1965 put the average, per-room maintenance charge at a little over $23, excluding utilities. In 1967, prior to occupancy, these estimates were revised upward to approximately $25 per room. In 1968, again prior t occupancy, when it became apparent that skyrocketing costs would necessitate future increases, all prospective tenants were notified in writing that their monthly carrying charges would be raised during 1970-71. In 1970 carrying charges were raised to approximately $29 per room. Further increases are scheduled for 1973 and 1974. As I have noted above, however, there has been no increase in the purchase price of $450 per room, and none is anticipated.

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

20. What caused the increases in carrying charges? The answer is inflation -- the runaway inflation during the period 1965-70, not only as it affected the construction industry, but interest rates, real estate taxes and operating expenses, as well. In essence, we were required to estimate the state of the national economy, inflation, wage rates, interest rates, tax rates, and the progress of the Vietnam war, among other things, for a period into the future of more than five years. These judgments were made even more difficult because the proposed development had no precedent. Co-op City is the largest apartment complex in the United States. It contains 35 high-rise apartment buildings plus stores, garages and townhouses. The move-in of 15,000 families was itself a major undertaking, covering a period of 3-1/2 years from December 1968 to March 1972.

21. By reason of the inflationary pressures, it became necessary at several points to increase the monthly carrying charge estimates. This was done on each occasion with the full approval of the State and the Agency. Although I do not here want to comment upon plaintiffs' claims with respect to alleged

misrepresentation in the "Information Bulletins," it is appropriate to point out that in October 1968, when it became evident that monthly carrying charges would have to be increased in 1970-71, each and every cooperator was advised of this in writing. Riverbay's Board of Directors issued these notices so that those who could not afford to pay more than their share of the earlier estimates would not undertake the obligation to do so. We did not want them to purchase homes for which they could not afford to pay. A copy of this notice is annexed hereto as Exhibit D.

22. At the time of this 1968 notice, Co-op City was entirely unoccupied. Every cooperator was in a position to withdraw and receive an immediate refund of his purchase price--a policy and practice which was and still is uniformly applied, both as to residents occupying apartments and those waiting to do so. Indeed, today any member dissatisfied with the amount of monthly carrying charges can withdraw from occupancy and receive his money back in full.

23. The carrying charge increases complained of by the cooperators resulted from a runaway national inflation during the period of construction. However,

the cooperators were forewarned. Had they continued to live elsewhere, be it rental apartments or private houses, they would surely have faced the same--if not greater--increases. Indeed, it is because the costs of housing at Co-op City are so low--even with the increases--compared to other available housing that Co-op City continues to be deluged with thousands of applications which it cannot possibly hope to fill. There are now approximately 7,000 families on the waiting list for apartments at Co-op City--any one of which would be delighted to buy an apartment at $450 per room and pay the carrying charges complained of by plaintiffs.

The Hanks Case

24. Increased carrying charges at Co-op City have been litigated before. In June 1970, two residents of Co-op City, as officers of a tenants' organization, brought an individual and class action in State Supreme Court seeking to annul the approval of increased monthly carrying charges by Commissioner Urstadt of the Division of Housing. That suit, Hanks v. Urstadt, et al. (Index No. 8611/70) contained a welter of charges all to the effect that the increases

were illegal and improper, and that the cooperators had been falsely induced to purchase apartments by representations that their monthly carrying charges would not increase.

25. In answer to these charges, the State Division of Housing and Community Renewal and Riverbay Corporation presented to the Court substantial evidence detailing the costs of construction of Co-op City, and the propriety of the actions of the Divisions and Riverbay. On the basis of these submissions, Justice Grumet dismissed the petition, holding that Commissioner Urstadt's order approving the carrying charge increase was proper and reasonable:

> "The respondent Commissioner and his staff carefully reviewed the figures which went into the projected budget employed by the Riverbay board of directors in determining the increase in carrying charges. In conformity with his duties, mandated by law, the Commissioner made a thorough and complete analysis of the costs and projected costs and based upon those made his findings. In doing so, he had the assistance of his various bureaus which analyzed the estimated figures. Financial computations were passed on by the Bureau of Finance and Audit; construction estimates were submitted to the Bureau of Engineering and Construction as well as the Architectural Bureau; and costs of maintenance and operation went to the Bureau of Management.

> "The Commissioner fulfilled his statutory responsibility of making certain that the estimated revenues would be sufficient to pay all the charges as defined in section 26 of the Private Housing Finance Law. The increase in carrying charges resulted from the application for an increase in mortgage funds. The use of estimates in projecting the annual expense and income must be recognized as being a matter of best judgment based upon knowledge and experience of both the builders and the Commissioner. The Legislature has placed upon the Commissioner the responsibility of making such judgment."

26. Justice Grumet's decision was unanimously affirmed by the Appellate Division, First Department on November 9, 1971 (37 A.D.2d 1064 (1971)).

27. The Amended Complaint before this Court is, I respectfully suggest, a refurbished version of the Hanks petition dismissed by Justice Grumet more than two years ago.

The Purchase of an Apartment in Co-op City

28. Co-op City was conceived, constructed and is operated for the sole purpose of providing good, moderate-cost housing to low and low-middle income families. It is not a profit making enterprise and the thousands of cooperators who have secured

apartments at Co-op City were not making a business investment, rather, they were purchasing a right to reside in a Co-op City apartment in accordance with the provisions of the New York State Private Housing Finance Law.

29. Indeed, as yet, none of the plaintiffs or other members of the alleged class is a stockholder in the State financed, cooperative enterprise. As will be pointed out below, the stock in the cooperative corporation (Riverbay) cannot be issued until the development is completed and the Commissioner of the Division of Housing and Community Renewal issues a final Certificate of Acceptability. Based upon my experience in other Mitchell-Lama projects, I estimate that the issuance of such a Certificate by the Commissioner will not occur for at least another 18 months to 2 years.

30. The so-called "securities" purchased by the cooperators at Co-op City are but incidental by-products of the principal purpose of the transactions -- to secure a place of residence. The several agreements executed by the cooperators, the by-laws of the cooperative corporation and the pertinent provisions

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

of the New York Private Housing Finance Law make this point indisputable.

The Subscription Agreement
and Apartment Application

31. The first document signed by a potential resident of Co-op City is a "Subscription Agreement and Apartment Application." A copy of this Agreement is annexed hereto as Exhibit E.

32. In the Agreement, the prospective resident subscribes to an amount of Class B stock in the cooperative corporation determined by the size of the apartment requested. A down payment is made and the subscriber agrees to pay the balance upon selection of a particular apartment.

33. In paragraph 3 of the Agreement the subscriber "applies for a non-proprietary occupancy agreement . . . which shall be for a term of not more than three years, which shall not be automatically renewable." This application for a three year lease is the very essence of the transaction.

34. Paragraph 4 provides that the cooperative corporation can terminate the subscription agreement and repay the subscriber under the terms and conditions

set forth therein. Paragraph 5 sets forth, in clear and unambiguous terms, the nature of the subscribers' position prior to issuance of the stock:

> "It is further understood, notwithstanding the full payment of the subscription price, that neither the stock subscribed for herein nor any other equity obligations of the Housing Company shall be issued or delivered until the aforesaid Project has been completed and a Certificate of Acceptability to the Housing Company has been issued by the Commissioner. UNTIL SO ISSUED AND DELIVERED, THE SUBSCRIBER SHALL NOT BE DEEMED TO BE A STOCKHOLDER NOR THE HOLDER OF ANY OTHER EQUITY OBLIGATION OF THE HOUSING COMPANY." (Emphasis added).

Thus, the plaintiffs in this action and every member of the alleged class is neither a stockholder nor the holder of any other equity interest in the cooperative corporation.

35. Paragraph 6 provides that the Agreement is non-assignable. Paragraph 7 provides for withdrawal by the subscriber and the terms and conditions for repayment of the amount paid in by the subscriber. No subscriber can or did make a profit when terminating his subscription agreement. Approximately 15,000 subscribers for apartments at Co-op City have withdrawn from their subscription

agreements and received full refunds of the amounts paid in.*

36. After the potential resident signs the subscription agreement, his application is submitted to the Commissioner, together with data relating to his family size, income, and credit references. The Commissioner must approve each individual applicant.

37. The provisions of the subscription agreement, taken collectively, show how remote such a transaction is from the ambit of "securities" as defined by federal law. The subscribers have, after submission to and approval by a state agency, secured the right, terminable by either side, to occupy an apartment at Co-op City under a non-proprietary lease for a three year term. They cannot make one penny of profit when the lease is terminated and they are, by express agreement, neither shareholders nor holders of any form of equity interest.

The Occupancy Agreement

38. When an apartment becomes available

*These withdrawals occurred during the years of waiting prior to occupancy of the project. The annual post-occupancy move-out rate is approximately 2%, or 300 families per year.

and the Commissioner has approved the application, the subscriber enters into an "Occupancy Agreement" with the cooperative corporation. A copy of the standard Occupancy Agreement is annexed hereto as Exhibit F. It should be noted that the prospective resident is referred to as "the member" (of the cooperative) rather than as a shareholder.

39. In form, the Occupancy Agreement is basically an apartment lease setting forth the rights, duties and obligations of the parties and providing for termination either through expiration of the term, breach or as otherwise provided therein. Unlike a lease, however, the Occupancy Agreement provides that upon its termination, the member shall sell his stock back to the corporation as set forth in the corporation's by-laws. Thus, we see again that a resident's ownership interest, this elusive "security," is wholly dependent upon occupancy of a Co-op City apartment.

40. Accordingly, a resident may be required to sell back his interest if, for example, he breaches his rental obligation or violates any of the other substantial rules and regulations contained in the

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

lease. Moreover, the member may decide to move out upon expiration of the lease, or earlier.

41. Whatever event terminates the Occupancy Agreement, paragraph "Seventh" provides for disposition of the member's stock interest:

> "SEVENTH: Upon the termination of this Agreement at any time and in any manner in this Agreement provided, the Member agrees to sell to the Cooperative or such person or corporation as may be designated by the Cooperative all stock of the Co-operative owned or held by the Member at said time, in the manner and upon the conditions set forth in the By-Laws of the Cooperative and any indebtedness of the Member to the Cooperative may be applied on the purchase price. Nothing herein contained, however, shall be deemed to constitute an agreement on the part of the Cooperative to purchase said stock, it being the intent hereof that the Cooperative or its designee shall have the option to purchase the same as set forth in the By-Laws of the Cooperative."

The By-Laws

42. The provisions of the Occupancy Agreement quoted above refer to the By-Laws of the cooperative corporation for the terms and conditions of resale of the member's stock; Article VII of the By-Laws, a copy of which is annexed hereto as Exhibit G, sets forth these terms and conditions, the most pertinent of which is Section 3.A:

"SECTION 3. Restrictions of Transfers.

"A. No stockholder shall have the right or power to pledge, sell, alienate or otherwise dispose of any share or shares of the capital stock of the corporation without first offering said share or shares of stock for sale to the corporation or its designee FOR THE AGGREGATE SUM WHICH SUCH STOCKHOLDER PAID FOR SAID STOCK, NOT TO EXCEED THE PAR VALUE THEREOF."
(Emphasis added)

The par value and price paid are, in all cases, exactly the same.

43. In short, the member shall get back what he paid, and no more. To repeat what I said earlier; this is not a business or investment enterprise, either for the sponsors and developers or for the members. Nobody looks for capital appreciation or the chance to turn over a profit. The sole object is to provide decent, safe residences for low and low-middle income families at the lowest possible cost. And to permit a member to sell his stock or other interest for more than he paid would subvert this purpose. A published statement describing the rationale behind this policy forbidding speculative resale of co-op membership is annexed hereto as Exhibit H. It evolves from the basic tenets of the cooperative movement, dating back

to the pioneer experiment in Rochdale, England, in 1844.*

44. The remaining provisions of Article VII of the By-Laws set forth the manner in which the cooperative corporation shall exercise its option to purchase as well as the members rights in the event the corporation does not exercise its option to purchase. I should point out that in my extensive experience in U.H.F. housing built under the Mitchell-Lama law, it has been a consistent policy for the cooperative corporation always to repurchase the member's interest. In view of the fact that there are now approximately 7000 families on Co-op City's waiting list, it is clear that any current member will be able to resell his cooperative membership to Riverbay and recapture his exact original cost -- no more and no less.

---

* U.H.F. is not just interested in housing. It is devoted to the cooperative movement in all areas of consumer interest. It works closely with the Co-operative League of the United States, the International Cooperative Alliance to the United Nations, the New York State Consumer Assembly, Inc., the Federation of Cooperatives and other similar organizations.

45. Another provision of Riverbay's By-Laws bears directly on the issue of whether the member's interest is a "security." Section 6 provides, among other things, that "each stockholder shall be entitled to one vote for any and all purposes regardless of the number of shares held by such holder." In other words, every apartment -- whether it is a 7 room townhouse apartment represented by 126 shares or a 3 room apartment represented by 54 shares -- has a single vote in the affairs of the cooperative; the amount of stock owned is entirely irrelevant. This demonstrates once more that stock ownership in the cooperative is but a mere incident to the primary purpose of membership in the cooperative; the acquisition of a home.

46. Not only is the number of shares owned by a member irrelevant to his voting rights, it is also irrelevant to the amount of his monthly carrying charges. Those charges, which are set in the Occupancy Agreement, and not in the Subscription Agreement, are based upon the number of rooms, the type of apartment, its location, height, etc. The number of shares owned is based solely on the number of rooms in the apartment,

without regard to the other factors that affect the carrying charges. Accordingly, there are many members who own more shares than others but who are paying lower monthly carrying charges.

47. That stock ownership in this non-profit cooperative enterprise is but incidental to the acquisition of a home is apparent. In addition, there is another element that demonstrates the inapplicability of standards designed to protect the investing public in the commercial market place to the facts before this Court. I refer to the question of damage.

48. The values of the so-called "securities" in this case are fixed; cooperators get out what they have put in -- no more and no less. Despite all of the allegations of fraud and deceit set forth in the Amended Complaint, it is not alleged, or indeed could it be alleged, that the interests owned by plaintiffs are worth any less than what they paid for them. In fact, plaintiffs nowhere contend that the values of their "securities" are any less than such values on the day of subscription.

49. Instead, the relief plaintiffs seek with respect to the alleged federal claim relates

entirely to their carrying charges, both past and future, computed exclusively in accordance with their occupancy agreements. With regard to past carrying charges, plaintiffs want reimbursement of an amount attributable to the alleged wrongful increases in construction costs. And with regard to future charges, plaintiffs seek to reduce Riverbay's mortgage by an amount of the alleged wrongful increases. In short, they want to pay the carrying charges originally estimated in 1965; they want the Court to innoculate them against the virus of inflation. This kind of relief is, I believe, not available in a suit under the Federal Securities Acts based on alleged misrepresentations in the sale of "securities."

Summary

50. The foregoing, I believe, amply demonstrates that the rights secured to members of Co-op City are far beyond the pale of anything intended by Congress in passing the Securit[illegible]ws for the protection of investors in the comm[illegible]. market place. There was and is no possibility of speculation or trading in the marketplace. The pertinent facts show that:

(a) The members are not now stockholders nor the holders of any other form of equity interest;

(b) The members can purchase their interests only if first approved by the State;

(c) Members are granted the non-transferable right to enter into a three year non-proprietary apartment lease with the cooperative corporation;

(d) Prior to execution of the lease, either party can terminate the subscription agreement and receive the amounts paid in;

(e) Ownership of stock or subscription rights are entirely dependent upon occupancy of an apartment under an apartment lease. Termination of that lease, either through breach or expiration, obligates the member to offer to resell his stock or subscription rights to the cooperative corporation;

(f) Such resale to the corporation shall be at the same price the member paid for the stock, or subscription right. No profit can be made on resale;

(g) There shall be one vote per apartment in connection with the affairs of the cooperative, regardless of the number of shares owned;

(h) Monthly carrying charges as set forth in the Occupancy Agreements, are determined not by the number of shares owned but by other factors; and

(i) The value of the alleged "security" was entirely unaffected by the conduct complained of and no damages relating to that security are sought.

51. Each of these characteristics, I submit, removes this case from the scope of the Federal Securities Laws. What kind of "security" ownership, I may ask, is rescindable by either the seller or the buyer? What kind of "security" ownership is entirely dependent upon residence in a specific apartment? What kind of "security" can be purchased only after a state agency approves the purchaser? What kind of "security" ownership is terminable if the owner fails to pay his rent? What kind of "security" is owned

AFFIDAVIT OF HAROLD OSTROFF
SWORN TO DECEMBER 19, 1972 -
IN SUPPORT OF MOTION TO DISMISS

in an entirely non-business, non-commercial context, where there is no speculation and no income, dividends, capital appreciation, profit or other investment motive and where the sole objective was and is to secure a moderate priced residence for oneself and ones family? The answer to these rhetorical questions is, I submit, apparent.

Conclusion

52. For all of the foregoing reasons, this Court should dismiss the Amended Complaint in its entirety as against the moving defendants for lack of subject matter jurisdiction.

s/ Harold Ostroff
Harold Ostroff

[Duly Sworn to
December 19th, 1972]

CERTIFICATE OF INCORPORATION
of
UNITED HOUSING FOUNDATION, INC.

(Pursuant to the Membership Corporation Law)

We, the undersigned, desiring to form a membership corporation pursuant to the Membership Corporation Law, do hereby certify and state as follows:

1. The name of the proposed corporation is United Housing Foundation, Inc.

2. This corporation is formed for the following charitable, scientific and educational purposes exclusively:

To improve the condition of the American people by voluntarily aiding and encouraging through charitable, scientific and educational methods (1) the development of adequate, safe and sanitary housing accommodations for wage earners and other persons of low or moderate income, (2) the elimination of substandard and unsanitary housing conditions; (3) the science of efficient and economical construction and operation of housing accommodations for wage earners and other persons of low or moderate income; (4) the dissemination of information of principles of consumer cooperation to wage earners and to other persons of low or moderate income; (5) the clearance, replanning, reconstruction and rehabilitation of urban slum areas by duly authorized private or governmental agencies and corporations, (6) duly authorized housing cooperative, and consumer cooperative and other agencies and corporations undertaking: (a) to plan, construct, operate or assist in the planning, construction or operation of such housing projects, or (b) to clear, replan, reconstruct, and rehabilitate urban slum areas, or (c) to carry on activities related or incidental thereto; (7) the dissemination of information pertaining to any of the foregoing.

It shall be within the purposes and powers of the corporation to use, as means to the above charitable, scientific and educational purposes: (a) the dissemination of educational information on the foregoing subjects by (1) printed matter; (2) lectures, forums and conferences; (3) research and scientific studies and (b) awards (c) the establishment and maintenance of agencies and corporations to further the above enumerated purposes (d) the voluntary assistance or support of other exclusively charitable, scientific and educational corporations; and further it shall be within the purposes and powers of the corporation to take all action which may be appropriate or useful to the furthering of the foregoing exclusively charitable, scientific and education purposes; subject, however, to such limitations as are provided by law.

BEST COPY AVAILABLE

It shall not be within the purposes or powers of the corporation to engage in propaganda or otherwise attempt to influence legislation, and the corporation shall not, either as one of its purposes or as a means of accomplishing any of its purposes, engage in propaganda, or otherwise attempt to influence legislation.

The purposes of the corporation shall not include any of the purposes referred to in Section 11 of the Membership Corporations Law as such law appears on the date hereof.

3. The operations of the corporation are principally to be conducted within the State of New York.

4. The principal office of the corporation is to be located in the County and State of New York. The corporation may have other offices either within or outside the State of New York.

5. The corporation shall have power to take and hold by bequest, devise, gift, purchase, lease or other conveyance or as beneficiary of a trust but not as trustee, any property, real, personal or mixed, without limitation as to amount or value, except such limitation, if any, as may be imposed by the laws of this State; to convey such property or any part thereof subject to approval of the Supreme Court of the State of New York; and to invest and reinvest any principal and deal with and expend income and principal of the corporation in such manner as in the judgment of the directors will best promote its aforementioned purposes.

The corporation is empowered to accept gifts, conveyances and bequests and devises of property, real, personal or mixed, benefits of trust, but not as trustee -- for specific charitable, scientific or educational purposes, but no purposes which are not charitable, scientific or educational.

All the property or funds of this corporation, as well as all the income and proceeds derived therefrom or from trusts of which this corporation is a beneficiary shall be devoted exclusively to charitable, scientific or educational purposes.

Should the corporation at any time become incapacitated from further operating on the purposes for which it is organized, whether by voluntary or involuntary dissolution or otherwise, all its general funds and property as well as all of the income therefrom and additions thereto, shall be conveyed or transferred, assigned and set over as the Board of Directors may determine either (a) to a corporation or fund organized and operated exclusively for charitable, scientific or educational purposes, or (b) to a corporation or fund to be created exclusively for such purposes; and no funds or property of this corporation shall be distributed either directly or indirectly to any member, officer or director thereof or for any purpose whatsoever other than charitable, scientific or educational purposes, subject to the provisions of the Membership Corporation Law.

This corporation is not established and shall not be maintained, conducted or used for pecuniary profit. The income and the property of the corporation from whatever source derived shall be applied solely towards the promotion of the objects of the corporation as set forth above; and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise to the members, officers, directors or employees of the corporation; nor shall any part of the net income or earnings of this corporation enure to the profit or benefit of any member or private individual; provided that nothing in this certificate contained shall prevent the payment in good faith of reasonable and proper remuneration to any member, officer, director or employee of the corporation, or to any other person, in return for any services actually rendered to the corporation, or the payment of interest on money lent.

6. The number of directors of the corporation shall not be less than three nor more than fifteen.*

7. The names and residences of the directors to serve until the first annual meeting are:

NAMES	ADDRESSES
Percy S. Brown	40-A Harvard Street Laconia, New Hampshire
Abraham E. Kazan	98 Van Cortlandt Park, South Bronx 63, New York
Louis H. Pink	200 East 66th Street New York 21, New York
Robert Szold	334 Pelhamdale Avenue Pelham, New York
Frederick F. Umhey	185 Murray Avenue Larchmont, New York

8. All of the subscribers to this certificate are of full age; at least two-thirds of them are citizens of the United States; at least one of them is a resident of the State of New York; and of the persons named as directors, at least one is a citizen of the United States and a resident of the State of New York.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this 24 day of May, 1951.

/s/ Louis H. Pink

/s/ Shirley F. Boden

/s/ Frederick F. Umhey

/s/ Abraham E. Kazan

/s/ Robert Szold

* In June, 1966, the number of directors was increased to not less than 5 nor more than 20.

BEST COPY AVAILABLE

EXHIBIT B - AMENDED COMPLAINT - ANNEXED TO AFFIDAVIT OF HAROLD OSTROFF

(Reproduced herein at pages 9a to 56a, supra.)

EXHIBIT C - ANSWER OF THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY - ANNEXED TO THE AFFIDAVIT OF HAROLD OSTROFF

(Reproduced herein at pages 57a to 61a, supra.)

CO-OP CITY

1968

a residential community cooperatively owned and operated

RIVERBAY CORPORATION
465 GRAND STREET / NEW YORK, N.Y. 10002 / OR 3-3900

HAROLD OSTROFF *President*
JACOB S. POTOFSKY *Vice President*
GEORGE SCHECHTER *Vice President*
LOUIS STULBERG *Secretary*
ROBERT SZOLD *Treasurer*

Dear Subscriber:

Re: Potential Rent Increase

Co-op City is being built during a period of severe inflation and all our costs, both for construction and operations, are being subjected to very heavy pressures. We are devoting all our efforts to minimize the impact of rising costs and are taking all steps possible to effectuate savings and to operate economically. There are, however, the following problems of which we believe you should be aware.

INTEREST CHARGES: In 1966 when Co-op City was first planned, interest rates were 3.75%. We estimated the availability of financing at 4% interest. In May, 1968 when our first permanent mortgage bonds were sold, the rate had risen to 5.2%. While rates are now declining slightly and we would estimate that the final average interest rate will be a little less, it is, nevertheless, higher than the original budgeted figure.

CONSTRUCTION COSTS: The contract price for Co-op City was negotiated within our anticipated budget figures. There are, however, escalations in regard to labor costs which will inevitably result in some construction cost increases. All construction projects also have many additional costs which arise during the construction period because of unforeseen conditions. These are subject to inflationary pressures. We would anticipate, therefore, that the final construction costs of Co-op City will be higher than the present projected costs.

REAL ESTATE TAX RATES: At the time the projected budget was prepared the tax rate was 5% of assessed value. We budgeted the rate of 5.5%, assuming that an earlier 1% per year increase would continue. In the 1968-1969 tax period the rate has already gone to 5.243%.

EXHIBIT D - NOTICE OF POTENTIAL RENT INCREASE -
ANNEXED TO AFFIDAVIT OF HAROLD OSTROFF

OPERATING COSTS: We would expect that with the present pressures for wage increases on the part of labor, all wage rates in future labor contracts will be increasing at a more rapid rate than in the past. We must assume also that the cost of all supplies and materials will be continuing to rise.

While we are alerting you to the above problem at this time, we will not need any increase before sometime during the period 1970-1971. Since prior to this period we are not obligated to start amortizing (repaying) our mortgage and will be paying only partial real estate taxes, we will have adequate cash income to meet all our obligations. We are therefore putting you on notice that sometime during the period of 1970-1971 your Board of Directors will be obligated to carefully evaluate all costs to determine the amount of the carrying charge increase which will be necessary so that the Cooperative can meet its obligations. We pledge to you that during this current period your officers and Board of Directors will be taking all possible steps to limit the amount of the increase but, nonetheless, an increase in carrying charges will be inevitable during 1970 or 1971.

In order to be certain that all members are fully aware and that there be no future misunderstanding, we request that you sign the attached statement indicating that you have read this memorandum and have been made aware that an increase in the carrying charges will be necessary during 1970-1971.

Cooperatively yours,

Harold Ostroff
President

BEST COPY AVAILABLE

October 1968

EXHIBIT D - NOTICE OF POTENTIAL RENT INCREASE - ANNEXED TO AFFIDAVIT OF HAROLD OSTROFF

TO RIVERBAY CORPORATION

This is to acknowledge that I have received a copy of the memorandum regarding rent increases during the 1970-1971 fiscal year, that I have read this memorandum, and I understand the factors which may cause increases in the monthly carrying charges in effect at the time I take occupancy.

X_____

X_____

Account No._____

Building No._____

Apartment No._____

EXHIBIT E - SUBSCRIPTION AGREEMENT AND APARTMENT APPLICATION - ANNEXED TO THE AFFIDAVIT OF HAROLD OSTROFF

Application #_____

RIVERBAY CORPORATION

SUBSCRIPTION AGREEMENT AND APARTMENT APPLICATION
(Limited to Residents of the State of New York)

(1) I, (we) , hereinafter individually and collectively called the "Subscriber", hereby subscribe at the par value and principal amount thereof, to an aggregate of:

Amount	Type of Apartment	Description of Apartment	
$375	A	1 bedroom apartment with kitchen and living room, without balcony. (3 Rooms)	( )
$375	B	1 bedroom apartment with kitchen, dining room and living room, without balcony. (3½ Rooms)	( )
$400	C	1 bedroom apartment with kitchen, dining room and living room, with balcony. (4 Rooms)	( )
$425	D	2 bedroom apartment with kitchen, dining room and living room, without balcony. (4½ Rooms)	( )
$450	E	2 bedroom apartment with kitchen, dining room and living room, with balcony. (5 Rooms)	( )
$475	F	3 bedroom apartment with kitchen, dining room and living room, without balcony. (6 Rooms)	( )
$500	G	3 bedroom apartment with kitchen, dining room and living room, with balcony. (6½ Rooms)	( )
$500	H	3 bedroom town house apartment with kitchen, dining room and living room, with balcony. (7 Rooms)	( )

(Please check the size of apartment desired)

par value of Class B capital stock of RIVERBAY CORPORATION, hereinafter called the "Housing Company", a corporation organized under the Limited-Profit Housing Companies Law of the State of New York, for the purpose of acquiring land and constructing and operating

a housing project located in Baychester, Borough of The Bronx, City and State of New York, hereinafter called the "Project".

I, (we) warrant and represent that I, (we) are bona fide residents of the State of New York.

This Subscription Agreement, the construction and operation of the Project by the Housing Company and the rights of the Subscribers and of the stockholders of the Housing Company are subject to the provisions of the Limited-Profit Housing Companies Law and any rules and regulations promulgated thereunder, the provisions of the Housing Company's Certificate of Incorporation and By-Laws, any agreements which may be made or entered into with the State of New York, the New York State Housing Finance Agency, the City of New York, as well as any indenture of mortgage made by the Housing Company to the State of New York, the New York State Housing Finance Agency, and any and all other contracts, agreements, mortgages, leases, and other instruments, and any and all modifications, renewals and extensions thereof heretofore or hereafter entered into by the Housing Company. The terms of the said contracts, agreements, mortgages, leases and other instruments, and any and all modifications, renewals and extensions thereof, shall be determined by the Housing Company's Board of Directors in its discretion, subject to the approval of the Commissioner of Housing and Community Renewal (hereinafter called the "Commissioner").

(2) I, (we), agree to pay the full subscription price as set forth in paragraph (1) hereof on or before the signing hereof. Any deposit made by the Subscriber herein shall be first credited toward the total amount of capital stock subscribed for and due hereunder, and the balance, if any, credited toward the purchase of the other equity obligations referred to herein.

The total equity requirement for each type of apartment, as described in paragraph (1) hereof, is as follows:

Type A - $1,350
Type B - $1,575
Type C - $1,800
Type D - $2,025
Type E - $2,250
Type F - $2,700
Type G - $2,925
Type H - $3,150

The Subscriber herewith agrees to invest a further sum equal to the amount of the total equity requirement for his apartment less the subscription price paid hereunder, which further sum shall be paid in cash upon selection of the particular apartment of the type hereinabove set forth. Such additional equity investment shall be evidenced by such equity obligations as may be issued by the Housing Company in accordance with the Limited-Profit Housing Companies Law of the State of New York.

(3) The Subscriber hereby applies for a non-proprietary occupancy agreement for the type of apartment hereinabove set forth, which occupancy agreement shall be for a term of not more than three years, which shall be automatically renewable, unless terminated at the end of any three-year term by the Housing Company or the tenant-cooperator. Such occupancy agreement will fix the payments on account of the carrying charge to be made thereunder. It is contemplated that the average carrying charge per month per rental room exclusive of utilities for the entire project will not exceed Twenty-Nine and 14/100 ($29.14) Dollars with the particular apartment carrying charge varying in accordance with the schedule approved by the Commissioner. After

thirty (30) days' notice by the Housing Company to the effect that the apartment is available for occupancy, or upon acceptance of occupancy by the Subscriber, whichever is earlier, the Subscriber shall make a payment for carrying charges covering the unexpired balance of the month. Thereafter, the Subscriber shall pay carrying charges in advance on the first day of each month.

(4) The Housing Company reserves the right at any time before an occupancy agreement is entered into with the Subscriber, for any reason deemed sufficient by the Housing Company, in its sole discretion, subject to the approval of the Commissioner, to repay the amount paid to it by the Subscriber. In the event that such repayment shall be made prior to the selection by the Subscriber of a particular apartment, or in the event this subscription agreement and apartment application is not approved by the Commissioner, such repayment shall be made without interest. In the event that such repayment is made after the Subscriber shall have so selected an apartment, such repayment shall be made with interest thereon at the rate of 2% per annum from the date of such payments by the Subscriber. Upon any such repayment under this paragraph, all rights of the Subscriber under this agreement will cease and terminate.

(5) It is understood that the Project and the Housing Company will be operated as a cooperative enterprise. Each stockholder will be entitled to only one (1) vote on any and all matters regardless of the number of shares of capital stock or any other equity obligations of the Housing Company which the Subscriber may own.

It is further understood, notwithstanding the full payment of the subscription price, that neither the stock subscribed for herein nor any other equity obligations of the Housing Company shall be issued or delivered until the aforesaid Project has been completed and a Certificate of Acceptability to the Housing Company has been issued by the Commissioner. Until so issued and delivered, the Subscriber shall not be deemed to be a stockholder nor the holder of any other equity obligation of the Housing Company. Nothing herein contained shall be interpreted to prohibit the issuance of any stock, if required by law, to the sponsors of the Housing Company for organization and corporate purposes.

(6) Neither this Subscription Agreement nor the apartment application shall be assignable by the Subscriber.

(7) The Subscriber may withdraw from this agreement at any time prior to selecting the particular apartment which he desires to occupy, and shall, upon such withdrawal, be entitled to a refund, without interest, of all the amounts paid hereunder. After the Subscriber shall have selected an apartment the Subscriber may also withdraw from this agreement at any time prior to executing said occupancy agreement and shall, upon such withdrawal, be entitled to a refund, without interest, of all amounts theretofore paid as equity investment, but such refund shall not be paid by the Housing Company to the Subscriber until the total equity subscribed for herein is sold to another applicant and the apartment selected by the Subscriber has been assigned to such other applicant.

If the premises shall have been painted to the specifications of a withdrawing Subscriber and, as a result of such withdrawal, it will be necessary to repaint to make the apartment suitable for another Subscriber, the cost of such repainting shall be deducted from the deposit, such cost to be approved by the Commissioner.

(8) The Subscriber hereby acknowledges receipt of an "Information Bulletin" for Riverbay Corporation, that he has read the Information Bulletin as well as the other documents therein

BEST COPY AVAILABLE

referred to and that he ratifies, approves and confirms the arrangements described in said Information Bulletin for the financing, construction and operation of the aforesaid Project and for the organization and administration of the Housing Company. In particular, Subscriber acknowledges that, as stated in said Information Bulletin, the harboring or keeping of any animals, including dogs, in apartments of the Housing Project shall not be permitted and shall constitute a violation of the Rules and Regulations of the Housing Company, subjecting the offending tenant to eviction from his apartment and/or other appropriate legal action.

(9) The Subscriber agrees that the apartment buildings shall be deemed duly and fully completed and the contract between the Housing Company and the Contractor duly and fully performed as soon as both of the following conditions are met:

(a) The final certificate of occupancy has been issued by the Department of Housing and Buildings of the City of New York;

(b) The Commissioner has issued his Certificate of Acceptability to the Housing Company.

The undersigned accordingly agrees when the aforesaid two events have occurred the same shall be conclusive proof that the Contractor has fully performed its contract with the Housing Company which is expressly authorized to pay to the Contractor all monies to which the Contractor may be entitled under its said contract with the Housing Company. The conclusiveness of the presumption that the buildings have been fully completed in accordance with the provisions of the Contractor's agreement with the Housing Company shall not be affected by the fact that as a condition of receiving the final payment on account of said contract, the Contractor may have agreed with the Housing Company and/or the State Division of Housing and Community Renewal to perform any work after the receipt of such final payment from which monies have been withheld.

(10) This Agreement, when executed shall supersede any and all prior agreements, oral or written, which may heretofore have been made between the parties.

Executed in duplicate this day of , 197 .

(Husband) _____ L.S.

As Joint Tenants with Rights of Survivorship

(Wife) _____ L.S.

_____
(Address)

Application # .....

Accepted:

RIVERBAY CORPORATION

By: _____

ACCOUNT NO. _____

BLDG. NO. & APT. NO. _____

CO-OP CITY
RIVERBAY CORPORATION

OCCUPANCY AGREEMENT

AGREEMENT made , between RIVERBAY CORPORATION, a corporation organized under the Limited-Profit Housing Companies Law of the State of New York, with its principal office at 465 Grand Street, New York, New York (hereinafter referred to as the "Cooperative"), and

(hereinafter referred to as the "Member");

WITNESSETH:

WHEREAS, the Cooperative has been organized for the purpose of constructing and operating a housing project in accordance with the provisions of the Limited-Profit Housing Companies Law; and

WHEREAS, the Member is within the class sought to be benefited by said law and is the owner of or has subscribed to shares of the capital stock of the Cooperative;

NOW, THEREFORE, in consideration of the premises and the mutual promises, covenants and conditions herein contained, the Cooperative and the Member covenant and agree as follows:

FIRST: The Cooperative hereby leases to the Member and the Member hereby hires and takes from the Cooperative the apartment known as Apartment No. in the building known as in the Borough of The Bronx, City and State of New York, to be used and occupied as a strictly private dwelling by the Member and his family, for a term to commence on the date that the leased premises are available for occupancy by the Member (of which date the Member shall be given at least thirty (30) days written notice) or the date of actual occupancy by the Member, whichever shall occur earlier, and to terminate on the day of , 19 , unless sooner terminated as hereinafter provided.

SECOND: The Member covenants and agrees to pay as an annual carrying charge, the sum of $
payable in advance in equal monthly installments of $
on the first day of each and every calendar month during the

term hereof. If only a part of a calendar month shall be included in the term hereof, then the carrying charges for such part shall be apportioned, and shall be due on the first day of such part. Said payments shall be deemed to be payments on account of the Member's annual obligation, which is hereby defined to be the Member's proportionate share of the operating costs of the Cooperative. The annual obligation of the Member for each year of the term hereof shall be finally determined by the Board of Directors of the Cooperative in the light of the year's operating experience. In the event that the revenues of the Cooperative shall exceed its operating costs, the Cooperative will pay or allow rebates to each member in the amount of his proportionate share of such excess, such rebates to be paid and allowed in such manner or in such form as from time to time the Board of Directors of the Cooperative, with the written approval of the Commissioner of Housing and Community Renewal of the State of New York (hereinafter referred to as the "Commissioner"), shall declare and determine. The Cooperative specifically reserves to itself the right, from time to time, to make application to the Commissioner for permission to increase the maximum average permissible carrying charges per month per rental room in accordance with the provisions of the Limited-Profit Housing Companies Law and the Member hereby consents thereto. Anything herein contained to the contrary notwithstanding, upon any such increase in such maximum average permissible carrying charges, the Member hereby covenants that the carrying charges payable by him hereunder shall be increased as of the effective date of such increase by the amount determined by the Commissioner as set forth on the revised rent schedule pertaining to the Project approved by the Commissioner in connection with such increase in such maximum average permissible carrying charge, and the Member hereby further covenants that he will pay such increased rental so determined by the Commissioner. Proportionate share, as used herein, shall mean that proportion which the carrying charge fixed herein bears to the total carrying charges paid by all members to the Cooperative.

The operating costs of the Cooperative, as used herein, shall include all expenses and outlays growing out of or connected with the construction, ownership, maintenance, and operation of the lands and buildings owned by the Cooperative and all facilities and activities connected therewith, which sum may include, among other things, taxes, assessments, water rents, sewer charges, insurance premiums, operating expenses, professional fees, salaries and wages, the cost of improvements, additions, alterations, replacements, and repairs, expenses and liabilities under or by reason of this or other occupancy agreements, interest on mortgage indebtedness, mortgage amortization payments, the payment of any other liens or charges, the payment of any deficit remaining from a previous period, the allocations to such reserve funds as may be reasonably required, and approved by the Commissioner, for replacement, vacancies, depreciation, obsolesence, bad debts, contingent losses or expenses or otherwise, the support and operation of community facilities and activities, and expenses for other purposes of the Cooperative. The Board of Directors of the Cooperative may include in the operating cost for any year any liabilities or items of expense which accrued or became payable in a previous year and also any sums which it may deem necessary or prudent to provide as a reserve against liabilities or expenses then accrued or thereafter to accrue.

THIRD: The Cooperative covenants and agrees:

1. To provide elevator service; hot and cold water in reasonable quantities at all times; air cooling at such times and at such temperatures as the Cooperative shall determine during the

warm seasons of the year; heat at reasonable hours during the cold seasons of the year; electricity; gas for cooking purposes; all of which is subject to the provisions of paragraph FIFTH (3) hereof.

2. To permit the Member peaceably and quietly to have, hold and enjoy the premises hereby leased, for the term aforesaid and subject to the terms hereof.

The aforesaid obligations of the Cooperative, and all other obligations of the Cooperative under this Agreement, are conditioned upon the Member paying the carrying charges and performing all the covenants and conditions hereof on the Member's part to be observed and performed.

FOURTH: The Member covenants and agrees:

1. To take good care of the leased premises and appurtenances and suffer no waste or injury and to repay to and reimburse the Cooperative, as and when the said repairs are needed and made by the Cooperative, the actual cost of all repairs in and about the leased premises occasioned or caused by the negligence, misuse, abuse, neglect or fault of or by the Member, his family, guests, servants, employees, visitors and licensees; all other repairs, except as provided in paragraph FOURTH (2) hereof, to be made by the Cooperative at its own cost and expense.

2. At the Member's own cost and expense, to redecorate and repaint, with paint of a type and quality reasonably satisfactory to the Cooperative, the leased premises at reasonable periods during the term of this Agreement and any extensions or renewals thereof, but not less than once every three years, and to maintain and keep in good repair and to replace when reasonably required all venetian blinds, shades, lighting fixtures, asphalt and vinyl tile flooring, ranges and refrigerators. The Cooperative shall not be required to make any of the repairs or replacements provided in this paragraph FOURTH (2) or to make any other repairs in, or to redecorate the leased premises, except as in this Agreement specifically provided.

3. To make no alterations, additions or improvements to the leased premises without the written consent of the Cooperative, and any such alterations, additions and improvements shall, at the option of the Cooperative, be the property of the Cooperative and shall be surrendered with the leased premises as a part thereof upon the termination of this Agreement. In the event the Cooperative does not exercise the foregoing option, the Member shall be obligated to remove such alterations, additions and improvements and to restore the leased premises to their original condition at the Member's own cost and expense.

4. Not to disfigure, deface or damage the leased premises or any other part of the buildings or suffer the same to be done; and not to do anything or suffer anything to be done upon the leased premises in a manner deemed extra hazardous thereby increasing the rate of fire insurance upon said building and not to permit the accumulation of waste or refuse matter.

5. To comply with all laws, ordinances and government regulations and the regulations of the New York Board of Fire Underwriters applicable to the leased premises.

6. To indemnify the Cooperative and save it harmless from any and all liability to person or property arising from injury occasioned wholly or in part by any act or omission of the Member or of his family, guests, servants, employees, visitors and licensees.

7. At the termination of this Agreement, and after inspection of the leased premises by the Cooperative, to repay the Cooperative the actual cost of repairing any and all injury occasioned by the installation or removal of furniture and property so as to restore the leased premises to their original state, reasonable wear and use excepted.

BEST COPY AVAILABLE

8. At the end of the term hereof or any renewals or extensions thereof, to quit and surrender the leased premises in as good order or condition as they were at the beginning of the term, reasonable wear and use excepted, and to reimburse the Cooperative for the cost of restoring the leased premises to such order or condition, including, without limitation, the cost of plastering, structural changes, repairs, cleaning, and, subject to the limitations contained in the immediately following sentence, repainting of the apartment. If, in the judgment of the Cooperative, the apartment can be repainted to a white color with one coat of paint the Member shall not be obligated to reimburse the Cooperative for any such painting; but if, in the judgment of the Cooperative, more than one coat of paint is required to repaint the apartment to a white color, then the Member shall reimburse the Cooperative for the cost of all but the last coat of paint.

9. If the premises be not surrendered at the end of the term the Member will make good to the Cooperative any damage which it may suffer by reason thereof and will indemnify the Cooperative against all claims made by any succeeding Member against the Cooperative founded upon the delay by the Cooperative to deliver possession of the premises to the said succeeding Member so far as such delay is occasioned by the failure of the Member to so surrender the premises.

10. Not to sell, assign, transfer, mortgage, encumber or create any charge upon this Agreement, nor sublet the leased premises or any part thereof or cause the leased premises or any part thereof or suffer the same to be used for any business, commercial or professional purposes or for any purposes other than as a private dwelling apartment for and the primary residence of the Member and his immediate family. The Member further agrees that no boarders or permanent guests shall be permitted.

11. To permit the Cooperative to erect, use and maintain pipes and conduits in and through the leased premises as may be reasonably required and to permit the Cooperative to enter the leased premises, to examine the same and to make such decorations, repairs, alterations, improvements, or additions as may be reasonably required, and the carrying charges shall in no wise abate while said decorations, repairs, alterations, improvements or additions are being made because of the prosecution of any such work or otherwise.

12. To permit the Cooperative, for a period of ninety (90) days prior to the termination of this Agreement, to enter the leased premises during reasonable hours for the purpose of exhibiting the same to persons desiring to rent the same.

13. If the Member shall not be personally present to open and permit an entry into the leased premises, at any time when for any reason an entry therein shall be necessary and permissible hereunder, the Cooperative may enter the same by a duplicate key or may forcibly enter the same without rendering the Cooperative liable therefor (if during such entry the Cooperative shall accord reasonable care to the Member's property) and without in any manner affecting the Member's obligations under this Agreement.

14. Not to require, permit or allow any window in the leased premises to be cleaned from the outside in violation of Section 202 of the Labor Law or of the rules of the Board of Standards and Appeals or of any other board or body having or asserting jurisdiction.

15. Not to use the services provided to the Member under paragraph THIRD (1) hereof in unreasonable quantities or in a wasteful manner or in any manner other than those for which they were intended.

16. The Member and the Member's family, servants, employees, agents, visitors and licensees shall observe faithfully and comply strictly with the rules and regulations set forth at the end of this Agreement, and such other and further reasonable rules and regulations as are

heretofore or hereafter adopted by the Board of Directors or other duly elected body of the Cooperative. The Cooperative's written consent which may be required by any of said rules and regulations may be conditioned upon such terms and conditions, including the payment or payments by the Member of such sum or sums as may be set forth in such consent, which payments shall be deemed to be additional carrying charges due hereunder, and such consent shall be conditioned upon the Member's continued compliance with such terms and conditions. The Member further agrees that the violation of any of said rules and regulations is to be considered a violation of a substantial obligation of tenancy and occupancy.

17. The Member warrants the accuracy of the statements made in the application and income survey submitted by the Member for occupancy, and agrees that the family income, family composition and other eligibility requirements shall be deemed substantial and material obligations of his tenancy and occupancy; that he will comply promptly with all requests for information in regard to family composition or family income, and that his failure or refusal to comply with a request for information with respect thereto shall be deemed a violation of a substantial obligation of his tenancy and occupancy; and agrees to pay surcharge rents in accordance with the schedule or schedules of surcharge rents approved by the Commissioner, which surcharges will be deemed to be additional carrying charges due hereunder.

FIFTH: The Cooperative and the Member mutually agree as follows:

1. The Cooperative shall not be liable for any damage to property entrusted to employees of the Cooperative nor for the loss of any property by theft or otherwise, it being expressly understood that no employee of the Cooperative is or shall be in any way authorized by the Cooperative to receive or hold for any Member any of the Member's property. The Cooperative shall not be liable for any injury or damage to persons or property resulting from falling plaster, steam, gas, electricity, water, rain or snow which may leak from any part of said building or from the pipes, appliances or plumbing works of the same or from the street or subsurface or from any other place or by dampness, unless caused by the negligence or carelessness of the Cooperative, its agents, servants, or employees.

2. This Agreement is subject and subordinate to all mortgages which may now or hereafter affect the real property of which the leased premises forms a part and to all renewals, modifications, consolidations, replacements and extensions thereof, and this Agreement shall not be a lien against said premises in respect of any mortgages that are now or that hereafter may be placed against said premises. The Member shall execute promptly any certificates that the Cooperative may request in confirmation of such subordination, and the Member hereby constitutes and appoints the Cooperative the Member's attorney in fact, to execute any such certificates for and on behalf of the Member.

3. No diminution or abatement of the carrying charges, or other compensation, shall be claimed or allowed for inconvenience or discomfort arising from the making of repairs or improvements to the building or its appliances nor for any space taken to comply with any law, ordinance or order of a governmental authority in respect to the various services herein agreed to be furnished by the Cooperative. It is agreed that there shall be no diminution or abatement of the carrying charges, or any other compensation, for interruption or curtailment of such services if such interruption or curtailment shall be due to accident, alterations or repairs desirable or necessary to be made or to inability or difficulty in securing supplies or labor for the maintenance of such service, or to some other cause, other than the negligence of the Cooperative, and no such interruption or curtailment of any such service shall be deemed a constructive eviction; provided that the Cooperative shall take reasonable measures to restore such services without

undue delay. The Cooperative shall not be required to furnish, and the Member shall not be entitled to receive, any of such service during any period when the Member shall be in default in respect to the payment of the carrying charges.

4. If a notice or notices of mechanic's lien be filed against the leased premises for labor or material alleged to have been furnished, or to be furnished, at the leased premises to or for the Member or for someone claiming under him, and if the Member shall fail to cause such lien to be discharged by bond or otherwise within 15 days after the filing of such notice or notices, the Cooperative may pay the amount of such lien or may discharge it by deposit, by bond or otherwise. In the event the Cooperative shall effect the discharge of the said lien or liens, the total expense incurred by the Cooperative in effecting such discharge shall be deemed an additional item to be included in the carrying charges payable by the Member for the leased premises and shall be due and payable by the Member to the Cooperative on the first day of the next following month. The receipt by the Cooperative of any installment of the regularly stipulated carrying charges hereunder or of any additional carrying charge shall not be a waiver of any other additional carrying charge then due.

5. The Cooperative shall not in any way have any responsibility to prevent, abate or cause the discontinuance of any noise or nuisance caused by other members or emanating from or existing in other apartments or locations in the buildings. The Cooperative shall cooperate in attempting to prevent, abate or cause the discontinuance of any such unreasonable noise or nuisance, but it shall not incur any liability for its failure to bring about any such prevention, abatement, or discontinuance, nor shall such failure affect or diminish any of the rights of the Cooperative or the obligations of the Member under this Agreement or be deemed a constructive eviction.

6. (a) If the Member shall default in fulfilling any of the covenants or conditions of this Agreement, other than the covenant for the payment of carrying charges or additional carrying charges, or shall fail or neglect to comply with any clause of any rule or regulation set forth at the end of this Agreement or heretofore or hereafter established as herein provided, or if the Cooperative shall in its judgment deem any conduct on the part of the Member objectionable or improper, or if the leased premises became vacant or deserted, the Cooperative may give to the Member ten (10) days notice of intention to end the term of this Agreement, and thereupon, at the expiration of said ten (10) days (if said default continues to exist) the term hereof shall expire as fully and completely as if that day were the day herein fixed for the expiration of the term and said term had not been renewed, and the Member will then quit and surrender the leased premises to the Cooperative but the Member shall remain liable as hereinafter provided.

(b) If the notice as provided for in (a) hereof shall have been given and the term shall expire as aforesaid; or if the Member shall make default in the payment of the carrying charges reserved herein or any part thereof or in the payment of additional carrying charges hereunder or any part thereof; or if the Member shall sell, encumber, assign or convey or otherwise lose title to all or any part of the stock of the Cooperative which he shall own; or if any execution or attachment shall be issued against the Member or any of the Member's property whereupon any of the Member's property upon the leased premises shall be taken or occupied or attempted to be taken or occupied by someone other than the Member; then and in any of such events the Cooperative may without notice, reenter the leased premises either by force or otherwise, and dispossess the Member and the legal representative of the Member or other occupant of the leased premises by summary proceedings or otherwise and remove their effects and hold the premises as if this Agreement has not been made, and the Member hereby waives the service of notice of intention to reenter or to institute legal proceedings to that end.

EXHIBIT F - OCCUPANCY AGREEMENT - ANNEXED
TO AFFIDAVIT OF HAROLD OSTROFF

(c) In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (i) the carrying charge shall become due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration, together with such expenses as the Cooperative may incur for legal expenses, attorneys' fees, brokerage and/or putting the leased premises in good order, or for preparing the same for re-rental; (ii) the Cooperative may re-let the premises or any part or parts thereof, either in the name of the Cooperative or otherwise, for a term or terms which may at the Cooperative's option be less than or exceed the period which would otherwise have constituted the balance of the term of this Agreement and may grant concessions or free carrying charges; and/or (iii) the Member or the legal representatives of the Member shall also pay the Cooperative as liquidated damages for the failure of the Member to observe and perform the Member's covenants herein contained, any deficiency between the carrying charges hereby reserved and/or covenanted to be paid and the net amount, if any, of the carrying charges collected on account of the occupancy agreement or agreements covering the leased premises for each month of the period which would otherwise have constituted the balance of the term of this Agreement. In computing such liquidated damages there shall be added to the said deficiency such expenses as the Cooperative may incur in connection with re-letting, such as legal expenses, attorneys' fees, brokerage and for keeping the leased premises in good order or for preparing the same for re-letting. Any such liquidated damages shall be paid in monthly installments by the Member on the carrying charge day specified in this Agreement and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of the Cooperative to collect the deficiency for any subsequent month by a similar proceeding. The Cooperative at the Cooperative's option may make such alterations and/or decorations in and to the leased premises as the Cooperative in the Cooperative's sole judgment considers advisable and necessary for the purpose of re-letting the leased premises; and the making of such alterations and/or decorations shall not operate or be construed to release the Member from liability hereunder as aforesaid. The Cooperative shall in no event be liable in any way whatsoever for failure to re-let the leased premises, or in the event that the leased premises are re-let, for failure to collect the carrying charge thereof under such re-letting. In the event of a breach or threatened breach by the Member of any of the covenants or provisions hereof, the Cooperative shall have the right of injunction and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not herein provided for. Mention in this Agreement of any particular remedy, shall not preclude the Cooperative from any other remedy, in law or in equity. The Member hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of the Member being evicted or dispossessed for any cause, or in the event of the Cooperative obtaining possession of the leased premises by reason of the violation by the Member of any of the covenants and conditions of this Agreement or otherwise.

7. If the Cooperative shall be unable to give possession of the leased premises on the date of the commencement of the term hereof by reason of the fact that the premises are located in a building being constructed and which has not been fully completed to make the premises ready for occupancy or by reason of the fact that a Certificate of Occupancy has not been procured or by reason of the fact that the previous occupant of the leased premises has delayed in vacating said premises or the Cooperative has been delayed in preparing the leased

BEST COPY AVAILABLE

premises for the Member after the previous occupant has vacated the same, or for any other reason, the Cooperative shall not be subject to any liability for the failure to give possession on said date. Under such circumstances the carrying charges reserved and covenanted to be paid herein shall not commence until the premises are available for occupancy by the Member, at which time the Member agrees to accept said premises, and no such failure to give possession on the date of commencement of the term shall in anywise affect the validity of this Agreement or the obligations of the Member hereunder, nor shall the same be construed in anywise to extend the term of this Agreement.

8. If the leased premises shall be partially damaged by fire or other cause without the fault or neglect of the Member, the Member's family, servants, employees, agents, visitors or licensees, the damages shall be repaired by and at the expense of the Cooperative, and the carrying charge until such repairs shall be made shall be apportioned according to the part of the leased premises which is usable by the Member. But if such partial damage is due to the fault or neglect of the Member, the Member's family, servants, employees, agents, visitors or licensees, the Member shall promptly reimburse the Cooperative for the cost of all such repairs, to the extent that such costs are not covered by the Cooperative's insurance, and there shall be no apportionment or abatement of the carrying charges. No penalty shall accrue for reasonable delay which may arise by reason of adjustment of fire insurance on the part of the Cooperative and/or the Member, and for reasonable delay on account of "labor troubles," or any other cause beyond the Cooperative's control. But if the leased premises are totally damaged or are rendered wholly untenantable by fire or other cause, and the Cooperative shall decide not to rebuild the same, or if the building shall be so damaged that the Cooperative shall decide to demolish it or to rebuild it, then or in any of such events the Cooperative may, within ninety (90) days after such fire or other cause, give the Member a notice in writing of such decision, and thereupon the term of this Agreement shall expire by lapse of time upon the third day after such notice is given, and the Member shall vacate the leased premises and surrender the same to the Cooperative.

9. If the whole or any part of the leased premises shall be taken or condemned by any competent authority for any public, or quasi public use or purpose, then, and in that event, the term of this Agreement shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose. No part of any award for the leased premises shall belong to the Member. The current carrying charge, however, shall in such case be apportioned.

10. No act or thing done by the Cooperative or its agents during the term leased hereunder or any renewal or extension thereof shall constitute an eviction by the Cooperative, nor shall be deemed an acceptance of a surrender of the leased premises, and no agreement to accept such surrender shall be valid unless in writing signed by the Cooperative. No employee or agent of the Cooperative shall have any power to accept the keys of said premises prior to the termination of this Agreement, and the delivery of keys to any employee or agent of the Cooperative shall not operate as a termination of this Agreement or a surrender of the premises.

The failure of the Cooperative to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this Agreement, or any of the rules and regulations set forth herein or heretofore or hereafter adopted by the Cooperative, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by the Cooperative of carrying charges with knowledge of the breach of any covenant of this Agreement shall not be deemed a waiver of such breach. The failure of the Cooperative to enforce any of the rules and regulations, set forth at the end of this Agreement, or heretofore or hereafter adopted, against the Member or against any other member residing in the buildings shall not be deemed a waiver of any such rules and regulations. No provisions of this Agreement shall be deemed to have been waived by the Cooperative unless such waiver be in writing signed by the Cooperative. No payment by the Member or receipt by the Cooperative of a lesser amount than the carrying charges herein stipulated or such other amount as may be fixed pursuant to the provisions hereof shall be deemed to be other than on account of the payment of the earliest stipulated carrying charges, nor shall any endorsement or statement on any check or on any letter accompanying any check or payment of the carrying charges be deemed an accord and satisfaction, and the Cooperative may accept such check or payment without prejudice to its right to recover the balance of such carrying charges or pursue any other remedy in this Agreement provided.

11. The parties hereto hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Agreement and/or the Member's use or occupancy of said premises, except as otherwise provided in Section 259-c of the Real Property Law of the State of New York.

12. Except as otherwise in this Agreement provided, a bill, statement, notice or communication which the Cooperative may desire or be required to give to the Member, including any notice of expiration, shall be deemed sufficiently given or rendered if in writing delivered to the Member personally or sent by ordinary or registered or certified mail addressed to the Member at the building of which the leased premises are a part or left at said leased premises addressed to the Member, and the time of the rendition of such bill or statement and the giving of such notice or communication shall be deemed to be the time when the same is delivered to the Member, mailed or left at the premises as herein provided. Any notice by the Member to the Cooperative must be served by registered mail, addressed to the Cooperative at the address where the last previous carrying charge hereunder was paid.

13. If the Member shall default in the performance of any covenant on the Member's part to be performed by virtue of any provision in any article in this Agreement contained, the Cooperative may immediately, or at any time thereafter, without notice, perform the same for the account of the Member. If the Cooperative at any time is compelled to pay or elects to pay any sum of money, or do any act which will require the payment of any sum of money, by reason of the failure of the Member to comply with any provision hereof, or, if the Cooperative is compelled to incur any expense, including reasonable attorneys' fees, in instituting, prosecuting

and/or defending any action or proceeding instituted by reason of any default of the Member hereunder, the sum or sums so paid by the Cooperative with all interest, costs and damages, shall be deemed to be additional carrying charges hereunder and shall be due from the Member to the Cooperative on the first day of the month following the incurring of such respective expenses.

14. The covenants, conditions and agreements contained in this Agreement shall bind and enure to the benefit of the Cooperative, and its successors and assigns, and shall bind the Member, and the Member's heirs, distributees, executors and administrators.

15. This Agreement contains the entire agreement between the parties, and any agreement hereafter made shall be ineffective to change, modify or discharge this Agreement, in whole or in part unless such agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

16. In the event that the Member hereunder shall be more than one person, (a) the term "Member" as used herein shall be deemed to refer collectively to all such persons, (b) such persons shall be deemed to hold the leased premises as joint tenants with right of survivorship, and not as tenants in common, and (c) the liabilities and obligations of such persons hereunder shall be joint and several.

SIXTH: Unless sooner terminated pursuant to the provisions hereof, the term herein granted shall be extended and renewed from time to time by and against all the parties hereto for further periods of three (3) years each from the expiration of the term herein granted and any extensions and renewals thereof, upon the same covenants and agreements as are herein contained, unless either party shall serve a notice in writing upon the other of an intention to surrender or have possession of the leased premises, as the case may be, at least ninety (90) days prior to the expiration of said term granted herein or any extended term. The Cooperative agrees to give to the Member, not less than one hundred five (105) nor more than one hundred twenty (120) days prior to the expiration of the term herein granted and each extension and renewal thereof, written notice, delivered to the Member personally or mailed to him by registered or certified mail, of the provisions of this Article SIXTH.

SEVENTH: Upon the termination of this Agreement at any time and in any manner in this Agreement provided, the Member agrees to sell to the Cooperative or such person or corporation as may be designated by the Cooperative all stock of the Cooperative owned or held by the Member at said time, in the manner and upon the conditions set forth in the By-Laws of the Cooperative and any indebtedness of the Member to the Cooperative may be applied on the purchase price. Nothing herein contained, however, shall be deemed to constitute an agreement on the part of the Cooperative to purchase said stock, it being the intent hereof that the Cooperative or its designee shall have the option to purchase the same as set forth in the By-Laws of the Cooperative.

EXHIBIT F - OCCUPANCY AGREEMENT - ANNEXED
TO AFFIDAVIT OF HAROLD OSTROFF

EIGHTH: This Agreement is subject to the powers, rights and privileges, and the restrictions and limitations thereon, of the Cooperative as a Limited-Profit Housing Company under the supervision and control of the Commissioner pursuant to the Limited-Profit Housing Companies Law, and to the rights and powers of said Commissioner under said law or any amendments thereto, by all of which both parties hereto agree to be governed, and to all of which both parties hereto assent. This Agreement is further subject to all rules and regulations now or hereafter promulgated by the Commissioner.

RULES AND REGULATIONS

1. No clothes washing machines, clothes drying machines, electric stoves, air conditioning units or power equipment shall be placed or used in the leased premises.
2. No dishwashing machines or freezing units shall be placed or used in the leased premises without the Cooperative's prior written consent and only under such terms and conditions as the Cooperative may establish.
3. No alterations, additions or improvements shall be made to the balconies or terraces of the leased premises, including but not limited to the installation of screens or other enclosures thereon.
4. The leased premises and the balconies or terraces thereof may be painted only in accordance with the rules therefor established by the Cooperative.
5. The sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors and halls must not be obstructed or encumbered or used for any purpose other than ingress and egress to and from the leased premises.
6. No signs, advertisements, lettering, notices, illumination, awnings, aerials, or other projections shall be exposed on, attached to or projected out of the outside walls of the building or the balconies, terraces, windows or entrance doors of the leased premises.
7. No baby carriages, velocipedes, or bicycles shall be allowed in elevators nor allowed to stand in the halls, passageways, areas or courts of the building.
8. Children shall not play in the lobbies, public halls, stairways, or elevators or on any of the exterior landscaped areas, except play areas designated for this purpose.
9. Supplies, goods and packages of every kind shall be delivered only at the entrance provided therefor, to the Member or to the Members' family, servants or agents, or in such manner as the Cooperative may provide and the Cooperative shall not be responsible for the loss or damage of any such property.
10. The laundry and drying apparatus of the Cooperative shall be used in such manner and at such times as the Cooperative may direct. The Member shall not dry or air clothes on the roof, balcony or terrace or out of windows.
11. The Cooperative may retain a duplicate key to the leased premises. No Member shall alter any lock or install a new or additional lock or knocker on any door of the leased premises.
12. No servants or employees of the Cooperative shall be sent out of the building by any Member at any time for personal purposes. No employee of the Cooperative shall be solicited or employed to do any work for any Member during such employee's working hours.
13. No Member shall allow anything whatever to fall from the windows or doors of the leased premises, nor shall sweep or throw from the leased premises any dirt or other substance into any of the corridors, halls, elevators, ventilators or elsewhere in the building.
14. No milk bottles, milk storage boxes, overshoes, packages or other articles shall be placed in the halls or on the staircase landings, nor shall anything be hung from the windows, terraces, or balconies, or placed upon the window sills, neither shall any linens, cloths, clothing, curtains, rugs or mops be shaken or hung from or on any of the windows, doors, balconies or terraces.
15. No door-to-door delivery of milk shall be permitted.
16. No Member shall make or permit any disturbing noises in the building by himself, his family, servants, employees, agents, visitors and licensees, nor do or permit anything by such persons that will interfere with the rights, comforts or convenience of other Members. No

Member shall play upon, or suffer to be played upon, any musical instrument or operate or suffer to be operated a phonograph, radio or television set in the leased premises between the hours of ten o'clock P.M. and the following eight o'clock A.M. if the same shall disturb or annoy other occupants of the building. No Member shall conduct or permit to be conducted, vocal or instrumental instruction at any time.

17. No radio or television aerial or other construction shall be erected on the roof, balcony, terrace, windows or exterior walls of the building. Any such radio or television aerial or construction may be removed by the Cooperative without notice and at the expense of the Member.

18. No dogs or other animals of any kind shall be kept or harbored in the leased premises.

19. The Member will faithfully observe the following procedures with respect to the use of the incinerator: (a) wrap dust, floor and powdered waste in compact packages before depositing the same; (b) thoroughly drain and wrap in paper all garbage before depositing the same; (c) refrain from forcing large bundles into the flue; (d) crush into tight bundles all loose papers before placing the same in the hopper door; (e) cause all bundles of waste to slide out of the hopper into the flue; (f) refrain from depositing waste of an explosive or inflammable nature or pressurized cans, paint or floor scrapings therein; (g) refrain from leaving any refuse outside the incinerator hopper in the public halls; (h) otherwise comply with all Fire Department regulations regarding the use of the incinerator.

20. The water-closets and other water-apparatus shall not be used for any purpose other than those for which they were constructed, nor shall any sweepings, rubbish, rags or any other improper articles be thrown into the same; and the cost of repair of any damage resulting from misuse thereof shall be borne by the Member by whom or upon whose premises it shall have been caused.

21. The Member agrees to indemnify and save harmless the Cooperative for any damage or injury to trees, shrubs, plants, street furniture and play equipment on the premises, caused by any member of his family, servants, employees, agents, visitors and licensees.

22. No person, other than employees of the Cooperative, shall enter upon or use the roofs of the building, except in case of emergency.

23. If a storeroom or storerooms are provided for the storage of carriages, bicycles, luggage and other property of the Members, such storeroom or storerooms shall be used only for the storage of items specified by the Cooperative and not prohibited by the Fire Department, Health Department, or other governmental agencies or by the Cooperative's insurance carrier or carriers. In no event shall any Member be permitted to store bedding or other inflammable items or material in such storeroom or storerooms. All items placed in such storeroom or storerooms by the Member shall be packaged and labeled in accordance with rules established by the Cooperative. The Members shall have access to such storeroom or storerooms only at such times as shall be specified by the Cooperative. The Cooperative accepts no obligation or responsibility with respect to any property stored in such storeroom or storerooms and shall not be liable for any loss of such property or damage or injury to person or property therein, unless caused by the negligence or carelesness of the Cooperative, its agents, servants or employees, and the Members shall place such property in such storeroom or storerooms at their own risk.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

X_____
Member, Lessee

RIVERBAY CORPORATION

By_____
Cooperative, Lessor

X_____
Member, Lessee

BEST COPY AVAILABLE

BY-LAWS

CONFORMED COPY

of

RIVERBAY CORPORATION

Organized Pursuant to the Limited-Profit
Housing Companies Law

ARTICLE I

DECLARATION OF PURPOSES

SECTION 1. This corporation is organized under and pursuant to the Limited-Profit Housing Companies Law of the State of New York and with the approval of the Commissioner of Housing and Community Renewal.

The object of the corporation is to construct and operate adequate, safe and sanitary housing accommodations for persons of low income, in accordance with cooperative principles, subject to the provisions and limitations of the Limited-Profit Housing Companies Law and the Rules and Regulations promulgated by the Commissioner of Housing and Community Renewal.

ARTICLE II

STOCKHOLDERS MEETINGS

SECTION 1. The first meeting at which the stockholders of Class B Common Stock shall be entitled to vote shall not be held until the expiration of thirty days after the Commissioner

of Housing and Community Renewal, or his successor, shall have issued a Certificate of Acceptability to the Company, as provided in the Certificate of Incorporation. Written notice of such meeting shall be given as provided in Article II, Section 2 hereof.

SECTION 2. Annual Meetings. The annual meeting of the stockholders of the corporation, after the first meeting of Class B stockholders, for the election of Directors and for the transaction of other business of the corporation shall be held at the office of the corporation in the Borough of Manhattan, City and State of New York, or at such other place in the City of New York as may be designated in the notice of meeting, at 8:00 P. M. on the 1st day of October, if not a legal holiday; and if a legal holiday, then on the next secular day following. Written notice of the annual meetings shall be mailed to each stockholder entitled to vote at such address as appears on the stock book not less than 10 nor more than 40 days prior to the date of the meeting; but any meeting at which all stockholders shall be present, or at which all stockholders not present have waived notice in writing, notice as above specified shall not be required.

SECTION 3. The Commissioner of Housing and Community Renewal or his duly authorized representative shall be notified in writing of and shall have the right to attend all meetings of the stockholders of the Company.

SECTION 4. Special Meetings. Special meetings of the stockholders for any purpose or purposes may be called at any time by the President or the Commissioner of Housing and Community Renewal or his duly authorized representative, and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors or at the request in writing of 25% of the stockholders who shall require the Secretary or other officer of the corporation to give notice of such meetings. Written notice of such meeting, setting forth the time and place of the holding of such meeting and the object thereof, shall be mailed to each stockholder entitled to vote at such address as appears on the stock book not less than 10 nor more than 40 days prior to the date of the meeting, but any meeting at which all stockholders shall be present, or at which all stockholders not present have waived notice in writing, notice as above specified shall not be required.

SECTION 5. Quorum. The usual quorum for meetings shall be presence in person of one-third of the holders of the outstanding stock entitled to vote, except that if the notice of meeting states that there will be a matter on the agenda which requires a vote of a majority or more of the stockholders, then in such event the quorum shall be the presence in person or by proxy of the number of stockholders required for approval of such matter,

but a lesser number may adjourn from time to time without notice other than an announcement at the meeting in which the requisite number of stockholders shall not be present.

SECTION 6. Voting. At all meetings of the stockholders, all questions the manner of deciding which is not specifically regulated by statute or by these By-Laws shall be determined by a vote of the majority of the stockholders present at the meeting. Each stockholder shall be entitled to one vote for any and all purposes regardless of the number of shares held by such holder. All voting, other than for directors, shall be vive voce except as otherwise prescribed by statute or these By-Laws.

SECTION 7. Proxies. No stockholder shall be permitted to vote by proxy (other than a proxy given to his or her spouse) at any annual or special meeting of stockholders, unless the Board of Directors, by resolution duly adopted, shall approve in advance the use of proxies at such meeting of stockholders, as set forth in Section 5 hereof.

SECTION 8. Order of Business. At all meetings of the stockholders the following order of business shall be observed so far as consistent with the purposes of the meeting:

1. Calling the roll of persons entitled to vote.
2. Proof of notice of meeting.
3. Reports, respectively, of President, Treasurer and Secretary
4. Reports of committees, if any.
5. Election of directors.
6. Transaction of such other business as may properly come before the meeting.

ARTICLE III
DIRECTORS

SECTION 1. The original incorporators-directors shall continue to serve until the project has been completed and fully accepted as evidenced by a Certificate of Acceptability issued by the Commissioner of Housing and Community Renewal to the Company. Thereafter, the first meeting of all of the stockholders shall be held as provided in Article II, Section 2, at which time a new Board of Directors will be elected to serve as provided in Article III, Section 2. In the event of the death, resignation or incapacity of any of the original incorporators-directors, prior to such first meeting of all of the stockholders, his or their successors must be approved by the Commissioner of Housing and Community Renewal.

SECTION 2. Number and Term of Office and Qualifications. The number of directors shall be five, plus one additional director who may be designated by the Commissioner of Housing and Community Renewal, until the first annual meeting of stockholders after the issuance of the Certificate of Acceptability by the Commissioner of Housing and Community Renewal, and thereafter the number of directors shall be fifteen, plus such additional director. Directors need not be stockholders. The total number of directors, exclusive of the appointee of the Commissioner of Housing and Community Renewal shall be divided into three classes. At the first annual meeting of

stockholders, after the issuance of the Certificate of Acceptability by the Commissioner of Housing and Community Renewal, the three classes of directors shall be elected for terms respectively of one, two and three years. At each subsequent annual meeting of stockholders, directors shall be elected for terms of three years to replace the directors whose terms are expiring in that year. Each director, except the appointee of the Commissioner of Housing and Community Renewal, shall serve as such director, until his successor has been elected and has qualified. The director who is appointed by the Commissioner of Housing and Community Renewal shall serve as such director until his successor shall have been appointed by said Commissioner, and shall have qualified.

SECTION 3. Vacancies. Any vacancy occurring in the Board of Directors by reason of death, resignation, removal or otherwise of any director elected by the stockholders, or by reason of any increase in the number of members constituting the full Board of Directors, may be filled for the unexpired term by a majority vote of the remaining directors unless such remaining directors are not sufficient to constitute a quorum, in which case a special meeting of stockholders shall be called and such number of directors shall be elected as may be necessary to constitute the full membership of the Board.

SECTION 4. Meetings. Meetings of the Board of Directors may be held at any time upon call of the President, or

any two members of the Board, or the Commissioner of Housing and Community Renewal or his duly authorized representatives. Such meetings shall be held at the office of the corporation except as otherwise determined and fixed from time to time by the Board of Directors.

SECTION 5. Notice of Meetings and Waiver of Notice. Notice of each meeting of the Board, stating the time, place and objects thereof shall be given by mailing at least forty-eight hours before such meeting, or by telegraphing at least twenty-four hours before such meeting, a copy of such notice addressed to each director at his last known post office address. Notice may be waived in writing by any director. Any meeting at which all of the directors are present, or of which those directors who are absent have waived notice in writing, may be validly held without notice. The Commissioner of Housing and Community Renewal or his duly authorized representative shall be notified in writing of and shall have the right to attend all meetings of the Directors of the Company.

SECTION 6. Quorum. A majority of the Board of Directors shall constitute a quorum, and a majority of the members in attendance at any meeting of the Board shall, in the presence of a quorum, decide its action; a minority of the Board present at any meeting may, in the absence of a quorum, adjourn to a later date but may not transact any other business.

SECTION 7. Committees. The Board of Directors may, from time to time appoint from its members Committees with such powers and duties as it shall determine.

SECTION 8. Duties and Powers. The Board of Directors shall have entire charge of the property, interests, business and transactions of the corporation, and may adopt such rules and regulations for the conduct of its meetings and management of the corporation as it may deem proper, not inconsistent with law or these By-Laws. The Board of Directors may delegate to the officers of the corporation such powers and authority and assign to them such duties as the Board may deem necessary, proper or appropriate to the effective prosecution of the corporation's business.

ARTICLE IV

OFFICERS

SECTION 1. Election. The Board of Directors at its first meeting after the election of directors in each year shall elect from its number a President and shall also elect a Vice-President, a Secretary and a Treasurer. It may elect an Assistant Secretary and an Assistant Treasurer, and such other officers as in its discretion the needs of the corporation may from time to time require.

SECTION 2. Term of Office. All officers of the corporation shall be appointed to hold their respective offices during the pleasure of the Board of Directors, and any vacancy

occurring in the office of the President, Vice-President, Treasurer or Secretary or any other office shall be filled by the Board of Directors.

SECTION 3. President. The President shall preside at all meetings of the Board of Directors, and shall act as chairman at and call to order, all meetings of the stockholders. Subject to the supervision and direction of the Board of Directors, the President shall have the general management of the affairs of the corporation and perform all the duties incidental to his office.

SECTION 4. Vice-President. The Vice-President shall, in the absence, disability or incapacity of the President, have the powers and perform the duties of the President, and those which the Board of Directors may assign to him from time to time.

SECTION 5. Secretary. The Secretary shall keep the minutes of the meetings of the directors and stockholders; shall attend to the serving of notices of the meetings of the directors and stockholders; shall affix the seal of the corporation to such certificates, documents and papers as may require it, except that from time to time the Board of Directors may direct such seal to be affixed by any other officer or officers; shall have charge of the stock certificate book and of such other books and papers as the Board of Directors may direct; shall attend to such correspondence as may be assigned to him, and shall perform all the

other duties incidental to his office and those which the Board of Directors may from time to time designate.

SECTION 6. Treasurer. The Treasurer shall be the chief financial officer of the corporation and shall have the care and custody of all the funds and securities of the corporation and shall deposit the same in the name of the corporation in such bank or banks as the directors may designate subject to the approval of the Division of Housing and Community Renewal. He may be required by the Board of Directors to give such bonds as it shall determine for the faithful performance of his duties.

SECTION 7. Assistant Secretary and Assistant Treasurer. The Assistant Secretary and the Assistant Treasurer shall, respectively, in the absence, disability or incapacity of the officer to whom he is an assistant, have the powers and perform the duties of such officer, and shall perform such other duties as may be assigned to them from time to time by the Board of Directors. They may be required by the Board of Directors to give such bonds as it shall determine, for the faithful performance of their duties.

SECTION 8. Other Officers. Other officers shall perform such duties and have such powers as may be assigned to them from time to time by the Board of Directors.

SECTION 9. The Treasurer may at the same time hold the office of Secretary or Assistant Secretary but no other office in the corporation.

EXHIBIT G - BY-LAWS OF RIVERBAY CORPORATION -
ANNEXED TO AFFIDAVIT OF HAROLD OSTROFF

ARTICLE V

OPERATION OF THE PROJECT AS A COOPERATIVE

Subject to the provisions of statute, the corporation will operate the project which it will develop in the Borough of The Bronx, City and State of New York, as a cooperative and, in accordance therewith, shall pay, or allow, as and when determined by the Board of Directors, and approved by the Commissioner of Housing and Community Renewal after the payment of obligations, expenses, taxes and assessments, and the establishment of suitable reserves, a rebate or rebates of rent to each tenant cooperator in proportion to the rental payments made by him during the period in respect of which such rent rebate or rebates are allowed or paid. The monthly rentals paid by the tenant cooperators shall be deemed to be payment on account of their annual rental obligation, which shall be finally determined by the Board of Directorsin the light of each year's operating experience, subject, however, in all respects, to the approval of the Commissioner of Housing and Community Renewal. The right to determine the method of management of the Cooperative shall be subject to the approval of the Commissioner of Housing and Community Renewal.

BEST COPY AVAILABLE

ARTICLE VI

SIGNATURE OF INSTRUMENTS

Checks, notes, drafts and orders for the payment of money and obligations of the corporation, and all contracts. mortgages,

deeds and other instruments, except as otherwise in these By-Laws provided, shall be signed by such officer, officers, individual or individuals as the Board of Directors may from time to time designate.

ARTICLE VII

CAPITAL STOCK

SECTION 1. Certificates. Certificates of stock shall be numbered and issued in consecutive order, shall be signed by the President or the Vice-President and by the Secretary or an Assistant Secretary or the Treasurer or an Assistant Treasurer, and sealed with the seal of the corporation; and in appropriate books of record shall be entered the name of the person owning the shares represented by each certificate, the number of shares and the date of issue. All certificates exchanged and returned to the Corporation shall be marked "Cancelled", with the date of cancellation by the President, a Vice-President, the Secretary or the Treasurer, and shall be filed among the corporate records of the corporation.

SECTION 2. Transfers. Shares represented by any certificate shall be transferable only as an entirety on the books of the corporation by the holder in person or by attorney, upon surrender of the certificate for such shares.

SECTION 3. Restrictions on Transfers.

A. No stockholder shall have the right or power to pledge,

sell, alienate or otherwise dispose of any share or shares of the capital stock of the corporation without first offering said share or shares of stock for sale to the corporation or its designee for the aggregate sum which such stockholder paid for said stock, not to exceed the par value thereof.

B. Such offer shall be made in writing, signed by such stockholder, and sent by mail to the corporation in a postpaid wrapper to the post office address of the corporation, at its principal place of business, and such offer shall remain good for acceptance by the corporation or a person designated by the corporation for a period of ninety days from the date of mailing such notice. Such offer shall constitute the corporation an agent for the sale of the shares of stock to the corporation or to such person as may be designated by the corporation.

C. If the corporation, or person designated by it, within the said ninety day period shall indicate that it, or the person designated by it, desires to purchase said shares of stock and shall give notice thereof in writing to the retiring stockholder, the latter shall be bound, within thirty days thereafter to transfer such shares and surrender his lease to the corporation or the person designated by the corporation, upon payment and receipt of the price herein provided.

D. In the eventthat the corporation or the person designated by the corporation shall not purchase said share or

shares of capital stock of the corporation within said ninety day period, then and in such event only, the stockholder shall have the right or power to pledge, sell, alienate or otherwise dispose of said share or shares of the capital stock of the corporation to any person acceptable to the corporation, and to the Commissioner of Housing and Community Renewal, provided such person shall, upon the transfer of said shares, enter into a non-proprietary lease with the corporation for the premises formerly occupied by the retiring stockholder for a term and upon the same terms and conditions contained in the non-proprietary lease between the stockholder and the corporation; the corporation will not, however, unreasonably withhold its acceptance of any person to whom the stockholder proposes to sell such shares as aforesaid.

In the event that the stockholder does not sell his stock to any person within six months after his right to do so has accrued, then and in such event he must again notify the corporation of his intent to transfer his shares and he shall again be bound by the provisions of Paragraphs A, B, C and D of this Article VII, Section 3.

E. If in any case the retiring stockholder, after becoming bound to sell, convey or transfer his shares to the corporation or such other person as may be designated by the corporation defaults in transferring said shares, the corporation or such other person as may be designated by the corporation shall, after notice

to and approval by the Commissioner of Housing and Community Renewal, hold the purchase money in trust for the retiring stockholder, or his executors, administrators or assigns and shall substitute the name of the purchaser upon the books of the company in place of the name of the retiring stockholder. After the name of the purchaser has been entered on the books of the corporation in the exercise of the aforesaid powers, the validity of the proceedings shall not be questioned by any person and the corporation or such other person as may be designated by the corporation shall be deemed and taken to be the owner of such shares.

F. In the event that the stockholder shall have defaulted in the payment of any obligation arising under his lease with the corporation or shall, apart from said lease, become indebted to the corporation, or in the event of the termination of the lease or the recovery of possession of the apartment by the lessor under any of the provisions of the lease, or in the event of the violation by the stockholder of any provisions of Article VII, Section 3 of these By-Laws, the stockholder shall forthwith surrender to the corporation the certificate representing the shares of capital stock of the corporation owned by the stockholder and upon the failure or refusal of the stockholder so to surrender said shares of stock, the same shall, after notice to and approval by the Commissioner of Housing and Community Renewal, be automatically cancelled and rendered null and void and the corporation may issue a

new certificate or certificates in their place and stead and such new certificate or certificates shall represent the same shares as were represented by the original certificate or certificates. The stock represented by the certificate or certificates so surrendered or by such new certificate or certificates may be sold by the corporation at public or private sale, without notice, and the proceeds applied toward all indebtedness of the stockholder, and the corporation shall remit any balance after payment of the expenses of sale to the stockholder, who shall remain liable for any deficiency.

G. No stockholder shall have the right or power to pledge or otherwise encumber any share or shares of the corporation which may have been issued by the corporation.

H. The provisions of this Article VII shall be binding upon any executor, administrator or other legal representative and successors and assigns of every stockholder. Any person, other than a surviving spouse, acquiring through will or descent, or by conveyance to take effect at death, any share or shares of the capital stock of the corporation shall be bound to offer the same for sale and transfer to the corporation upon the terms hereinabove set forth in this Article VII, Section 3 of the By-Laws.

I. The certificates of stock shall bear a legend to the effect that the right to pledge, encumber, sell, alienate or

otherwise dispose of the share or shares represented by such certificate is restricted as provided in this Article VII, Sections 2 and 3.

SECTION 4. The corporation shall be entitled to treat the holder of record of any share or shares of capital stock of the corporation as the holder in fact thereof, and shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person whether or not it shall have express or other notice thereof, except as expressly provided by the laws of the State of New York.

SECTION 5. The corporation shall have a lien upon the shares of stock of any stockholder and upon all moneys due and owing by the corporation to any stockholder for any and all debts owed to the corporation by such stockholder. The Board of Directors may refuse to approve a transfer of any shares upon which the corporation has such a lien.

SECTION 6. As used in this Article the words "stock", "shares of stock" and "certificates of stock" shall include any interest in the corporation, and the word "stockholders" shall include the owner or holder of any such interest.

ARTICLE VIII

AMENDMENTS

These By-Laws may be amended, repealed or altered, in whole or in part, by vote of a majority of the stockholders of the

corporation at any duly called annual or special meeting of the stockholders, provided the proposed amendment is set forth in the notice of the meeting. The Board of Directors shall not alter or repeal any By-Laws adopted by the stockholders of the corporation, but may adopt additional By-Laws, in harmony therewith, which may be amended or altered by the stockholders at the next annual meeting or at a special meeting of the stockholders called for this purpose. Any and all amendments or changes of these By-Laws shall not take effect until approval thereof by the Commissioner of Housing and Community Renewal.

ARTICLE IX

SEAL

The seal of the Corporation shall be circular in form and shall bear the name of the corporation, the words "Corporate Seal", the year of incorporation and the words "New York" as follows:

Approved this 15th day of June 1965

s/ James Von Klemmer

COMMISSIONER OF HOUSING
AND COMMUNITY RENEWAL OF
THE STATE OF NEW YORK

Should Apartments Go To Highest Bidder?

When members move from Co-op City, why shouldn't they be permitted to sell their shares on the open market and make whatever speculative profit the market will allow?

In response to this question the following statement has been issued:

Co-op City is sponsored by the United Housing Foundation with the assistance of the State of New York, which provides the mortgage funds (about 90% of the cost) at reasonable interest rates, and the City of New York, which granted a very substantial tax abatement in order to make possible housing at the most reasonable cost possible for eligible persons whose incomes average about $8,000 per year and who do not exceed prescribed income limits.

In order to be certain that the cost of entering and living in Co-op City does not go beyond the means of the average citizen, the New York State Division of Housing, which supervises Co-op City, does not permit speculative resale of co-op membership. United Housing Foundation agrees with this point of view. The members of Co-op City have a good buy because of the non-profit construction (UHF receives no builders profit) and the help of the State and City. If shares are sold at market prices (very high today because of the extreme shortage of housing) those intended to be served could not join. Only higher income families could pay the initial cost. Those who could pay the cost would frequently be ineligible because of the legal income limits. The first group to suffer would be the senior citizen and the second, those reaching out from the depressed and ghetto areas of our city.

The member of Co-op City receives a very substantial return on his investment during the period of his occupancy through substantial monthly savings in the cost of his housing. (Just compare the cost of your new apartment in Co-op City, even after a 16% increase, with any other new housing under construction or planned today.) It is to preserve this benefit for those who need it tomorrow, as well as those fortunate to have it today, that speculation in this type of housing is not permitted.

The rule is quite different for cooperatives built by speculators. Co-op City is designed to serve people, not to be a source of exploiting them. It is because this has worked well for over forty years that our members feel secure in their investment and why not one, but two and three generations of cooperators live in UHF cooperatives. Senior citizens, children of cooperators, newlyweds, and those of limited means can look forward with some hope for possible apartments from waiting lists fairly maintained, rather than making apartments available to the highest bidder and only to those who can afford to pay the highest price.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

S I R S :

PLEASE TAKE NOTICE that, upon all the papers heretofore filed herein, the undersigned will move this Court before Hon. Lawrence W. Pierce, D.J., in Room 2601 United States Courthouse, Foley Square, New York, New York on January 9, 1973, at 10 A.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the Amended Complaint herein in its entirety as against them on the ground that this Court lacks subject matter jurisdiction over the claims set forth therein; upon the ground that the defendants, State of New York and New York State Housing Finance Agency are not "persons" within meaning of the Civil Rights Act provisions set forth in the amended complaint; upon all the grounds set forth in the said defendants' answer sworn to November 7, 1972, and, as to the defendant State, more particularly,

NOTICE OF MOTION BY THE
DEFENDANTS, STATE OF NEW YORK
AND NEW YORK STATE HOUSING
FINANCE AGENCY, TO DISMISS
AMENDED COMPLAINT

upon the ground set forth in the answer that the State of New York, one of the named defendants is immune from suit herein by reason of the provisions of the Eleventh Amendment to the Constitution of the United States.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 9(c) of the General Rules of this Court, answering papers and memoranda are required to be served at least three days before the return date of this motion.

Dated: New York, New York
December 21, 1972

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
The State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
80 Centre Street
New York, New York 10013
By:

/s/ DANIEL M. COHEN
DANIEL M. COHEN
Assistant Attorney General
Tel: (212) 488-3446

NOTICE OF MOTION BY THE
DEFENDANTS, STATE OF NEW YORK
AND NEW YORK STATE HOUSING
FINANCE AGENCY, TO DISMISS
AMENDED COMPLAINT

TO: PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.
477 Madison Avenue
New York, New York 10022

SULLIVAN & CROMWELL, ESQS.
48 Wall Street
New York, New York

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
345 Park Avenue
New York, New York 10022

ALAN G. BLUMBERG, ESQ.
30 Broad Street
New York, New York 10004

NOTICE OF CROSS-MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavits of Milton Forman and Jay F. Gordon, both duly sworn to on January 30, 1973, the exhibits annexed thereto, and the pleadings herein, the undersigned will, on February 6, 1973, the return date of the defendants' motion herein, at 10:00 a.m. or as soon thereafter as counsel can be heard, cross-move this Court before Hon. Lawrence W. Pierce, in Room 2601, United States Courthouse, Foley Square, New York, N. Y. for an order:

1. Pursuant to Rule 23, FRCP, granting class action status to Counts First through Ninth of the Amended Complaint.

2. Pursuant to Rule 56, FRCP, granting summary judgment to plaintiffs on the First, Fourth, Fifth, Ninth and Tenth Counts of the Amended Complaint on the issue of liability only and dismissing all defenses applicable thereto.

3. Pursuant to Rule 65, FRCP, granting a preliminary injunction restraining the collection of any increase in carrying charges in excess of those which were in effect on December 31, 1972.

4. Granting plaintiffs such other and further relief which this Court may deem proper.

Dated: New York, N.Y.
February 1, 1973

Yours, etc.,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

By s/ George Berger
A Member of the Firm

Attorneys for Plaintiffs
477 Madison Avenue
New York, N. Y. 10022
758-6700

TO: PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
Attorneys for Defendants
Community Services, Inc.,
United Housing Foundation,
Harold Ostroff, Robert Szold,
Milton Altman, George Schechter,
Anthony Marino, Paul Kramer,
Irving Alter and Julius Goldberg
345 Park Avenue
New York, N. Y. 10022
935-8000

HON. LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE
OF NEW YORK
Attorney for the State of New York
and New York State Housing
Finance Agency
80 Centre Street
New York, N. Y. 10022
488-3446

SULLIVAN & CROMWELL
Attorneys for Defendant Riverbay Corporation
48 Wall Street
New York, N. Y. 10005
422-8100

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

JAY F. GORDON, being duly sworn, deposes and says:

1. I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the plaintiffs in this action. I make this affidavit in opposition to the defendants' motion to dismiss the amended complaint and in support of the plaintiffs' cross-motion for an order:

(a) granting class action status to the first nine counts of the amended complaint;

(b) granting summary judgment to the plaintiffs on the issue of liability only, with respect to the first, fourth, fifth, ninth and tenth counts of the amended complaint; and

(c) enjoining pendente lite the collection by defendant Riverbay Corporation ("Riverbay") of any carrying charges in excess of those which were in effect on December 31, 1972.

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

THE FACTS

2. My firm was first consulted in late October, 1971 with respect to the grievances which ultimately gave rise to this litigation. At that time I met with various members (including some of the above-named plaintiffs) of the Co-op City Advisory Council, which represented all of the tenant-shareholders of Co-op City, a Mitchell-Lama cooperative housing project of more than 15,000 apartments in Bronx County, New York. They complained of skyrocketing increases in their carrying charges, alleged defects in construction and various other suspected scandals and abuses. As it developed, however, they were wholly unaware of the frauds and other wrongs, later detailed in the amended complaint herein, which had been practiced upon them and their fellow subscribers to the stock of Riverbay. Those facts, as alleged in the amended complaint and detailed and documented in support of this cross-motion, came to light only after our initial discussions, the subsequent retainer engagement of my firm and the investigation which we conducted, as hereinafter set forth.

3. I inquired as to the manner in which they had become interested in Co-op City and had become subscribers to the stock of Riverbay, the cooperative corporation. I was told that they had responded to newspaper advertisement and had then received, by mail, certain sales pamphlets or brochures, together with application forms.

4. In response to my request for copies of these items, I finally received, in late January, 1972, an "Information Bulletin", dated May 15, 1967, which stated that it was a revision of a prior May 12, 1965, "Information Bulletin". Since the "Information Bulletin" had all the earmarks of a stock prospectus, it became necessary to determine that it was authentic and whether any others had been circulated and used in connection with the sale of Riverbay stock. Accordingly, I requested the New York State Executive Department's Division of Housing and Community Renewal (which the "Information Bulletin" said was "supervising" Co-op City) to supply me with a copy of each such document which was on file. In response to my request, I received a letter, dated February 4, 1972 (copy of which is annexed hereto as Exhibit

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

"1") and the enclosures referred to therein. Annexed hereto as Exhibits "2" and "3", respectively, are copies of the "1965 Information Bulletin" and "1967 Revised Information Bulletin", which were enclosed with said letter. A copy of the third enclosure, the "1968 Letter re: Increase in Carrying Charges" has already been annexed as Exhibit D to the moving affidavit of the defendant Harold Ostroff.

5. Thereafter, with the consent of the Commissioner and by arrangement with representatives of the Division's Bureau of Finance, I made several visits to the Bureau's offices at 393 Seventh Avenue, New York City and I was permitted to examine various documents on file in connection with the Co-op City project. I then requested and received copies of specified documents from the Division of Housing and Community Renewal's files. Copies of some of those documents are annexed hereto, as follows:

Exhibit "4" - Construction Contract, dated June 18, 1965, between Community Services, Inc. ("Community"), as Contractor and Riverbay, as Owner;

Exhibit "5" - Modification No. I, dated April 14, 1967, of said Construction Contract;

Exhibit "6" - Modification No. II, dated January 22, 1968, of said Construction Contract;

Exhibit "7" - Modification No. III, dated March 29, 1968, of said Construction Contract;

Exhibit "8" - Modification No. IV, dated October 9, 1969, of said Construction Contract;

Exhibit "9" - Modification No. V, dated July 7, 1971, of said Construction Contract;

Exhibit "10" - Building Loan Agreement, dated July 15, 1965, between New York State Housing Finance Agency (the "Agency"), as Lender and Riverbay, as Borrower;

Exhibit "11" - Modification Number One, dated April 14, 1967, of the Building Loan Agreement;

Exhibit "12" - Modification Number Two, dated February 3, 1969, of the Building Loan Agreement;

Exhibit "13" - Modification Number Three, dated October 9, 1969, of the Building Loan Agreement;

Exhibit "14" - Modification Number Four, dated July 7, 1971, of the Building Loan Agreement;

Exhibit "15" - Sales Agency Agreement, dated June 18, 1965, between Riverbay, as Owner and Community as Agent;

Exhibit "16" - Modification of Sales Agency Agreement, dated April 14, 1967;

Exhibit "17" - Modification Number II, dated October 9, 1969, of Sales Agency Agreement;

Exhibit "18" - Administrative Service Agreement, dated June 18, 1965, between Riverbay, as Owner and Community, as Agent;

Exhibit "19" - Modification of Administrative Service Agreement, dated April 14, 1967;

Exhibit "20" - Modification Number II, dated October 9, 1969, of Administrative Service Agreement;

Exhibit "21" - Letter, dated June 16, 1965, from Community to Mr. Paul Belica, Executive Director, State Housing Finance Agency, containing handwritten endorsement on the face thereof, with December 31, 1964 unaudited balance sheet of Community attached;

Exhibit "22" - Letter, dated June 18, 1965, from Community to New York State Division of Housing and Community Renewal;

Exhibit "23" - Letter, dated June 18, 1965, from Riverbay to New York State Division of Housing and Community Renewal;

Exhibit "24" - Riverbay Rent Schedule and Equity Requirements, dated June 1, .965 and approved July 15, 1965;

Exhibit "25" - Schedules A & B, dated June 18, 1965;

Exhibit "26" - Schedules A, B & C, dated March 13, 1967;

Exhibit "27" - Schedule A and Financial Estimates, dated March 29, 1968;

Exhibit "28" - Schedules A, B & C, dated September 15, 1969;

Exhibit "29" - Schedules A, B & C, dated May 1, 1971;

Exhibit "30" - Letter, dated June 30, 1971, from Charles J. Urstadt, Commissioner of Housing and Community Renewal, to Hon. Joseph H. Murphy, Chairman, New York State Housing Finance Agency, with attached certified copy of resolutions of Riverbay's Board of Directors.

6. In the course of my examination of the foregoing documents at the offices of the Division of Housing and Community Renewal (the "Division"), it became apparent that Community's lump sum fixed

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

price construction contract for $258,678,000., referred to in the original May 12, 1965 Information Bulletin, had been changed five times, so as to increase Riverbay's construction cost to $340,500,000, although both the original and the revised Information Bulletins stated that "the risk of completing the construction within the (original) lump sum price is upon the Contractor". In addition to increasing the overall contract price to $340,500,000., Community had increased its flat fee for "home office overhead" from an original $2,000,000. to $3,050,000., contrary to the terms of the Information Bulletins and the Construction Contract itself.

7. I then had a conversation with Henry Nussbaum, Director of the Division's Bureau of Finance. I asked Mr. Nussbaum why the State had approved five separate changes of this lump sum, fixed price contract, so as to give Community, the general contractor, an additional $82,000,000. for increased costs. Mr. Nussbaum told me that this had become a common occurrence in all U.H.F. sponsored projects, because Abraham Kazan, who was the President of United Housing Foundation, Inc. (the sponsor), Riverbay (the cooperative

owner) and Community (the general contractor-builder) at the time the project was planned and commenced, "always did the same thing". Nussbaum said that it was Kazan's regular practice to understate construction costs on all projects built by Community and sponsored by U.H.F. Nussbaum said that he had remonstrated with Kazan on prior occasions when Community sought increases and he had asked him why he didn't state his construction costs realistically, in the first instance. He said that Kazan told him that if he projected construction costs realistically in his original applications to the Division and the Agency, he would lose bargaining power when it came time to negotiate with subcontractors and suppliers for the construction of the jobs. Kazan contended that, if Community took the construction contracts at low, fixed prices, he was in a position to get better prices from the subcontractors and suppliers. Mr. Nussbaum told me that the Division had given up trying to reform Mr. Kazan's practices before the Co-op City project came along; and that they went along with his methods, even though they knew the jobs would cost more and Community would require increases in its "fixed price" contracts,

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

because U.H.F., under Kazan's guidance, was doing most of the substantial Mitchell-Lama construction in New York State.

8. In the course of my conversations with Mr. Nussbaum, I also inquired about the "liquid asset prequalification" which had been waived for Community, in connection with the Co-op City project, by handwritten endorsement on Community's letter of June 16, 1965 (Exhibit 21 annexed hereto). Mr. Nussbaum told me that the Division had promulgated a "Guide for Development of Limited Profit Housing", some time before the Co-op City project was started, for the purpose of acquainting developers and contractors with the Division's rules and regulations, forms and other requirements for submission and development of Mitchell-Lama housing project proposals. He gave me a copy of the Guide and pointed out the portion thereof (on page 35) which was headed "CONTRACTOR'S FINANCIAL PREQUALIFICATION REQUIREMENTS" and which read as follows:

> "All GCs submitting proposals for LPH Companies shall have as free liquid assets $105,000 plus 5% of the amount of the contract in excess of $1,000,000, as set forth in the table below:

Amount of Contract	Base	Base Amount	Amount per $1,000 above Base
Above $1,000,000	$1,000,000	$105,000	$50.00

The determination of free liquid assets will be based on a financial statement of GC of recent date certified by a Certified Public Accountant."

9. Mr. Nussbaum told me that the foregoing requirements had existed in June, 1965 when the Co-op City proposal was approved; and that this was the "liquid asset pre-qualification" which had been waived for Community, as general contractor. Accordingly, the Division and the Agency, on June 17, 1965, waived their own purdent rule which would have required Community, as general contractor for construction of Co-op City, to have free liquid assets of approximately $13,000,000., although Community's latest financial statement, which had then been submitted to the executive director of the Agency, showed its free liquid assets to be less than 1% of the amount required! The only explanation appearing for such an incredible act was a reference to Community's "past performance" and "the technical set up of his operation". The waiver of this most essential protection for thousands of innocent people who would be purchasing shares of Riverbay, the

cooperative housing company, becomes even more appalling in view of (a) Community's absolute commitment in the construction contract to complete the project for the lump sum price fixed therein; (b) the representation to that effect in the Information Bulletin; and (c) the Division's knowledge that Community, under Kazan's direction, had never yet honored such a commitment!

10. Even at this stage of revelation of the incredible history of the Co-op City project, the plaintiffs and my firm were still unaware that Community, the general contractor on this several-hundred-million-dollar construction job, which completely lacked the financial responsibility mandated by the State's own regulations and which, by the Agency's waiver, had been given a blank check drawn on the accounts of the future owners of Co-op City, was nothing more than a wholly-owned subsidiary of the project sponsor, United Housing Foundation, which in turn had organized and continued to control, through common directors and officers, the cooperative corporation (Riverbay) which it (U.H.F.) had formed for the purpose of selling over $32,000,000. in stock to the public!

THE NEED FOR CLASS ACTION STATUS

11. If we were to construct a theoretical state of facts to justify a class action, it would be difficult to improve upon the actual facts in this case. There are over 15,000 subscribers to and beneficial owners of Riverbay stock, all of whom reside in Co-op City. They purchased their stock, after receiving by mail one or both of the Information Bulletins (Exhibits 2 and 3). The 57 named plaintiffs represent a complete cross-section of that community. The claims asserted are common to all members of the class and a disposition of those claims, accordingly, will affect all of the members of the class, just as the defendants' acts and omissions have uniformly affected all of the members of the class. A clear illustration is provided by reference to Exhibit 25 annexed hereto: on June 21, 1971, Riverbay filed an application to increase the Agency's mortgage loan on the project by $60,000,000. "...in order to cover increases in construction costs...", among other things; on June 23, 1971, the Board of Directors of Riverbay, controlled by the defendants, resolved to increase the carrying charges of the plaintiffs and

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

all the other resident-shareholders of Co-op City, by 20% effective January 1, 1973 and by an additional 12-1/2%, effective July 1, 1974; on June 24, 1971, Riverbay filed its application for approval of the said increase in carrying charges; and on June 30, 1971, the Commissioner communicated to the Chairman of the Agency his approval of the application for increases in the mortgage and the carrying charges, all without notice to the plaintiffs or the other members of the class. Instead, some nine months later, in a futile attempt to obtain retroactive absolution, the Commissioner scheduled a "public meeting" to give the "tenant-cooperators at Co-op City... an opportunity... to develop and present... alternate recommendations, based upon facts and sound findings, and with the burden of proof on the tenants, which would show that a lesser amount than the projected... (20% and 12.5%)... increase ... would suffice ..." (letter of Ass't Commissioner Hecht, dated March 8, 1972, annexed as Exhibit 31). (emphasis supplied). As a result, the first 20% increase in carrying charges has already been put into effect, for all resident-shareholders of Co-op City, as of January 1,

1973; and, unless relieved by the temporary injunction requested herein, all of them will be obliged to pay those increases, as well as the additional 12-1/2% increase scheduled to take effect on July 1, 1974, while the very questionable propriety of the defendants' conduct, which resulted in the increases, is being determined in this action. Obviously, there are common questions involved which affect uniformly all resident-shareholders of Co-op City; and it is most desirable that those questions be determined in one action, in one court, for the benefit of all affected parties.

PARTIAL SUMMARY JUDGMENT
AND A TEMPORARY INJUNCTION
SHOULD BE GRANTED

12. The attached exhibits, which document plaintiffs' claims and establish defendants' liability on the first, fourth, fifth, ninth and tenth counts of the amended complaint, are analyzed and referred to at length in the accompanying memorandum of law. There can be no dispute with respect to the facts derived from the defendants' own documents. The resulting questions of law are considered in the said memorandum.

AFFIDAVIT OF JAY F. GORDON SWORN
TO JANUARY 30, 1973 - IN OPPOSITION
TO DEFENDANTS' MOTIONS AND IN SUPPORT
OF CROSS-MOTION

13. Similarly, the need and basis for an injunction pendente lite against collection of the latest carrying charge increases are fully set forth in the accompanying affidavit of Milton Forman, the first named plaintiff herein, who has personal knowledge of the facts; and the applicable questions of law are also considered in plaintiffs' memorandum.

s/ Jay F. Gordon
Jay F. Gordon

[Duly Sworn to
January 30th, 1973]

EXHIBIT "1" - LETTER DATED FEBRUARY 4, 1972 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

EXECUTIVE DEPARTME... DIVISION OF HOUSING A... COMMUNITY RENEWAL

393 SEVENTH AVENUE
NEW YORK N. Y. 10001

STATE OF NEW YORK
CHARLES J. URSTADT

February 4, 1972

Jay Gordon, Esq.
Phillips, Nizer, Benjamin, Krim & Ballon
477 Madison Avenue
New York, New York 10022

Re: Riverbay Corp., HCLP #81
(Co-op City)

Dear Mr. Gordon:

At your request, I am enclosing herewith copies of the following used with respect to Co-op City:

1. 1965 Information Bulletin

2. 1967 Revised Information Bulletin

3. 1968 Letter re: Increase in Carrying Charges

Very truly yours,

Henry Russbaum
Director, Bureau of Finance

By _____
Philip Wagner
Assistant Director

PW/mk

EXHIBIT "1"

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

UNITED HOUSING FOUNDATION

invites your participation in

CO-OP CITY

A COOPERATIVE
HOUSING
COMMUNITY

INFORMATION
BULLETIN
Riverbay
Corporation

EXHIBIT "2"

MEMBERS OF THE UNITED HOUSING FOUNDATION

HOUSING COOPERATIVES

Amalgamated Dwellings, Inc.
Amalgamated Housing Corporation
Amalgamated-Warbasse Houses
Beech Hills Corporation
Bell Park Gardens
Bell Park Manor & Terrace
Big Six Towers, Inc.
Deepdale Gardens Corporation
East River Housing Corporation
Electchester
Hillman Housing Corporation
Joint Queensview Housing Enterprise, Inc.
Kingsview Homes, Inc.
Mutual Housing Association, Inc.
Mutual Redevelopment Houses, Inc.
Park Reservoir Housing Corporation
Queensview West
Ridgewood Gardens
Rochdale Village
Seward Park Housing Corporation

LABOR UNIONS

Amalgamated Clothing Workers of America
American Radio Association AFL-CIO
Associated Musicians of Greater New York
Brotherhood of Painters, Decorators & Paper Hangers of America, District Council No. 9
Building Service Employees International Union
Chain Service Restaurant, Luncheonette & Soda Fountain Employees Union, Local No. 11
Delicatessen & Restaurant Countermen Union
Department Store Workers Union, Local 1-S
District Council 37, American Federation of State, County & Municipal Employees
Dressmakers' Union, Local 22, ILGWU
Drug & Hospital Employees Union, Local 1199
Hotel & Club Employees Union, Local 6
International Brotherhood of Electrical Workers
International Brotherhood of Electrical Workers, Local 3, E Division
National Maritime Union of America
Newspaper Guild of New York, Local No. 3
New York City Central Labor Council
Retail, Wholesale & Chain Store Food Employees Union, Local No. 338
Transport Workers Union of Greater New York
United Federation of Teachers, Local No. 2
United Hatters, Cap & Millinery Workers Union
Utility Workers Union of America Local 1-2
Wood, Wire & Metal Lathers' International Union

CIVIC, FRATERNAL AND OTHER ORGANIZATIONS

Consumers' Cooperative Services, Inc.
Farband Labor Zionist Order
Goddard-Riverside Community Center
Hudson Guild, Inc.
Lenox Hill Neighborhood Association
Mid-Eastern Cooperatives, Inc.
Workmen's Benefit Fund
The Workmen's Circle

THE UNITED HOUSING FOUNDATION IS A MEMBER OF THE COOPERATIVE LEAGUE OF THE USA.

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

The United Housing Foundation

THE UNITED HOUSING FOUNDATION is a federation of housing cooperatives, civic groups, labor unions and other non-profit organizations. Its purpose is to acquaint people with the opportunities and advantages of home ownership by using the cooperative method. The housing organizations affiliated with the United Housing Foundation represent over 26,000 families who enjoy the benefits of cooperative home ownership.

The shortage of housing in the New York area is a great problem to the average family. It is also a community problem. Thousands of families have found that only by joining a cooperative organization they can collectively help themselves.

The United Housing Foundation has initiated and sponsored a number of developments. These include, among others, the 1,672 unit ILGWU Cooperative Village, the Penn Station South Cooperative with 2,820 units, the Seward Park Houses with 1,728 units, the 2,585 unit Amalgamated-Warbasse Houses, and Rochdale Village with 5,860 apartments.

In its program to develop more moderate-cost housing the Foundation is sponsoring Co-op City for 15,500 families. The purpose of this booklet is to acquaint you with the plans for that cooperative.

BEST COPY AVAILABLE

What is a Cooperative?

A cooperative is a non-profit enterprise owned and controlled democratically by its members — the people who are using its services. A cooperative is organized by a group of people who share a common need. They join together, pool their resources and work together to achieve a common purpose.

As a basic principle a cooperative is open to all people, without restrictions as to race, color or creed. As long as a member demonstrates that he believes in the objective of the cooperative he is welcome to join the organization.

One of the many examples of cooperation has been in the field of cooperative home ownership. For nearly forty years people have found that they can provide themselves with this necessity of life effectively, efficiently and economically.

How a Housing Cooperative Operates

A cooperative enterprise is owned by its member-stockholders. To become a member of a housing cooperative one makes an equity investment in proportion to the size of the dwelling unit desired. If a member subscribes for a six room unit, his investment will be twice as large as the member who subscribes for a three room unit. A cardinal principle in a cooperative organization is that each member, regardless of the size of his investment, or the number of shares he owns, has one vote in the affairs of the cooperative.

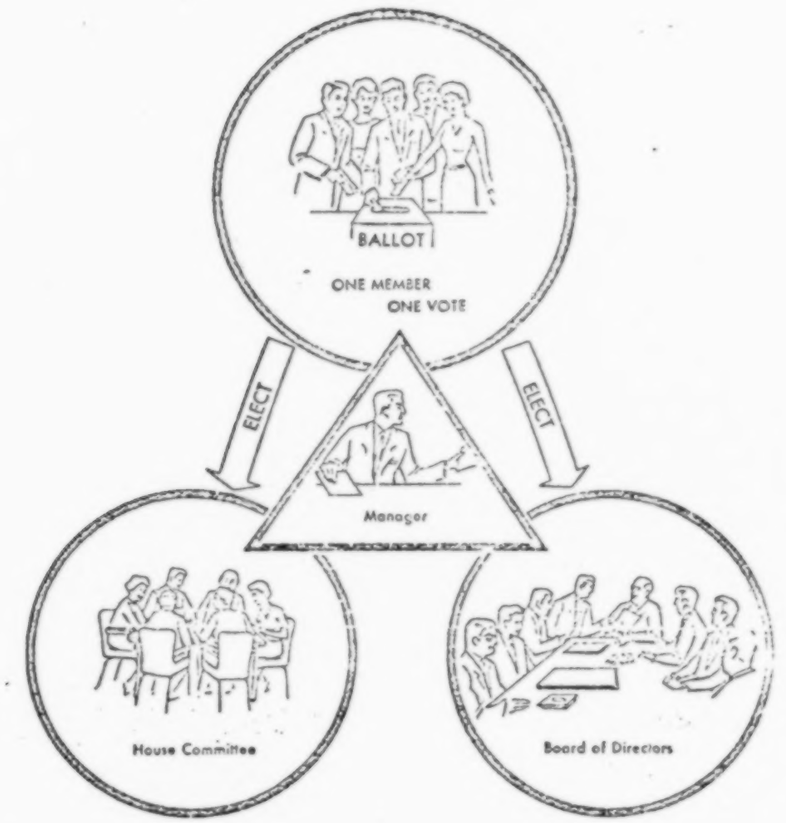
A member does not own his own apartment but shares in the ownership of the entire development. He is given a non-proprietary lease on a specific apartment, for a specified period of time. If a member of the cooperative and the housing corporation agree, the lease may be renewed at specific periods of time. The board of directors of the cooperative, subject to the approval of the Division of Housing and Community Renewal in the case of a cooperative such as Co-op City, reserves the right to refuse to renew the lease of any member upon the expiration of his existing lease. In such case the member will be required to vacate his apartment.

Each member pays his share of the carrying charges necessary to operate and maintain the development. The carrying charges are used to pay the interest and amortization on the mortgage, fuel, wages and salaries, repairs, maintenance and all other expenses. The carrying charges are based on the size and location of the members' apartment.

A cooperative is a non-profit enterprise. If there should be a surplus of income over expenses at the end of the year, the Board of Directors, after providing for adequate reserves, may return this surplus, or part of it, to the cooperators in the form of a rent rebate. On the other hand, if the expenses exceed the income, the carrying charges might have to be increased.

When a member wishes to withdraw from

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

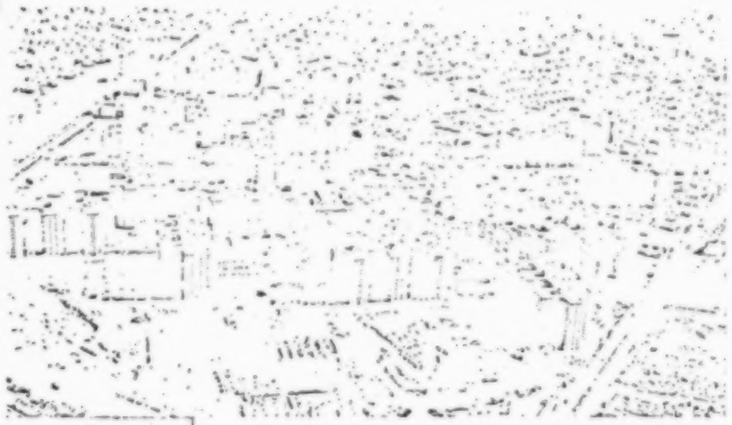


the cooperative, he must give the cooperative an option to repurchase his stock, at the price he paid for it, before he has the right to sell his stock to others.

In addition to the benefits which cooperative ownership makes possible, cooperation entails responsibilities and obligations. It is for that reason that it is essential for the members to take an active interest in the affairs of the cooperative, to vote intelligently on matters concerning the organization and to select competent and qualified people to serve on the Board of Directors.

The Board of Directors is responsible for the business of the cooperative. It is the Board who hires the manager. The Directors, of course, are responsible to the members. The initial Board of Directors will be responsible for the construction and completion of the job. This Board will function for the first year of operations after the completion of construction.

BEST COPY AVAILABLE

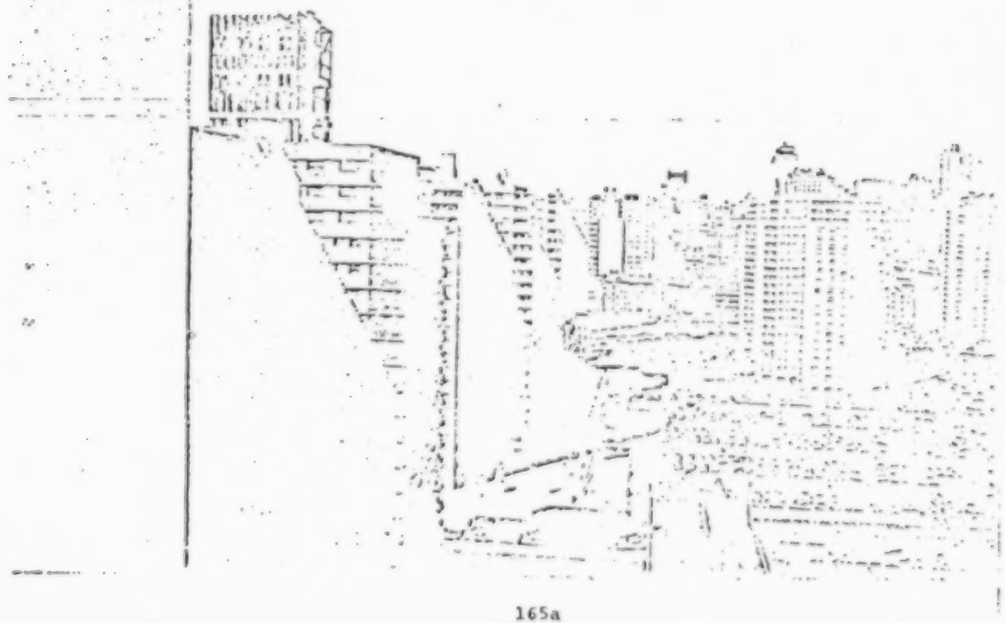


Completed in 1965 Rochdale Village is presently the largest cooperative housing development in the world. Sponsored by the United Housing Foundation it provides homes for 5,060 families. It was built at a cost of 100 million dollars.

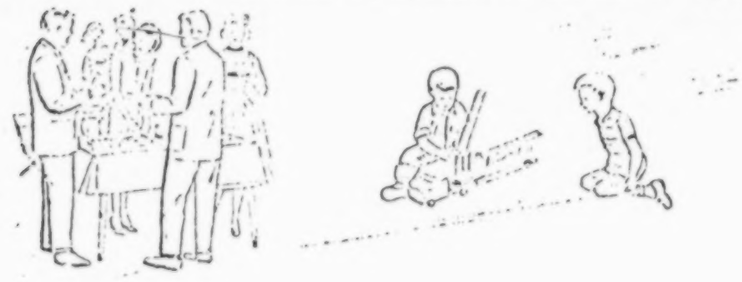
Two of the four buildings which make up the 1,672 unit ILGWU Cooperative Village, on the east side of Manhattan.

Occupancy of the Amalgamated-Warbasse Houses in Brooklyn was completed in February 1965. The 2,585 family cooperative was sponsored by the United Housing Foundation and the Amalgamated Clothing Workers of America.

2,820 families live in the ILGWU Cooperative Houses in mid-town Manhattan. This 45 million dollar cooperative was sponsored by the United Housing Foundation and the International Ladies' Garment Workers' Union.



BEST COPY AVAILABLE



The Advantages of Cooperative Housing

People find living in a cooperative community enjoyable for more than one reason. Most people join, however, for the simple reason that it is a way to obtain decent housing at a reasonable price. However, there are other advantages. The purpose of a cooperative is to provide home ownership, not just apartments to rent. The community is designed to provide a favorable environment for family and community living. If you have lived in a private apartment house you were the tenant and someone else the landlord. The landlord's interest was in financial gain. There was no common interest between the tenants. You may have lived in the same apartment for years without getting to know your neighbors.

The common bond of collective ownership which you share makes living in a cooperative different. It is a community of neighbors. Home ownership, common interests and the community atmosphere make living in a cooperative like living in a small town. As a rule there is very little turnover in a cooperative.

There is another, rather intangible factor, which appeals to many people. It is being a part of a group working for common purposes to benefit all. In many cooperatives the self-help method which made the housing possible is extended to meet the needs of consumers in other fields. It is not uncommon for cooperators to organize cooperative foodmarkets, credit unions, nursery schools, insurance plans, health plans, — all designed to benefit themselves.

At the time of apartment selection, applicants will be requested to make a loan to the United Housing Foundation, Inc. in the amount of $10.00 per rental room. This loan will be used to enable the Foundation to continue its assistance to Co-op City and other housing developments, and their members, and will be evidenced by a note of United Housing Foundation, Inc. to the applicant repayable upon the termination of the tenant-cooperator's occupancy in the development, with interest at the rate of 2 per cent per annum. In the event the applicant withdraws from the subscription agreement at any time prior to entering into the occupancy agreement, such loans shall be repaid to him at such time with interest at the foregoing rate.

The investment a person makes in a cooperative often represents a large share of his life's savings. To insure the investment against a time when there might not be an applicant for the apartment a special reserve fund will be established. Tenant-cooperators will be required to make payments, at the time they pay their carrying charges, of fifty cents per room, per month, to this reserve fund, the payments will continue until it is determined that sufficient reserves have been established. This fund will be used exclusively for the repurchase of stock in the event no other purchasers are available.

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

INFORMATION BULLETIN

RIVERBAY CORPORATION

A Limited-Profit Housing Project Supervised By The Commissioner of Housing and Community Renewal of The State of New York.

Supervised by:	DIVISION OF HOUSING AND COMMUNITY RENEWAL OF THE STATE OF NEW YORK James Wm. Gaynor Commissioner
Proposed Mortgage Financing by:	NEW YORK STATE HOUSING FINANCE AGENCY
Partial Tax Exemption Granted by:	THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK
Sponsor:	UNITED HOUSING FOUNDATION, INC. 465 Grand Street New York 2, New York
Attorneys:	SZOLD, BRANDWEN, MEYERS, BLUMBERG & ALTMAN 30 Broad Street New York 4, New York
Architect:	HERMAN J. JESSOR 465 Grand Street New York 2, New York
Contractor:	COMMUNITY SERVICES, INC. 465 Grand Street New York 2, New York

Date: May 12, 1965

BEST COPY AVAILABLE

This Bulletin has been prepared by the Housing Company for the information of prospective subscribers. All contracts and agreements referred to herein and all project costs are subject to review, audit and final approval by the Commissioner of Housing and Community Renewal of the State of New York (hereinafter called the "Commissioner"), and to such changes as the Commissioner may require or approve.

SCOPE OF THIS BULLETIN

A subscription for membership in a housing cooperative is the first step toward your participation in the cooperative ownership of a real estate project, which involves risks and responsibilities, as well as rights and privileges. This Bulletin is intended to provide some of the basic information concerning this cooperative. In addition, you should familiarize yourself with the Certificate of Incorporation and any amendments thereto, By-Laws, occupancy agreement, subscription agreement, minutes of meetings of incorporators and directors and the several contracts referred to herein, copies of which are now available, or will be made available, for your inspection at the office of the sales agent. It is urged that you consult the above documents prior to the time of your signing the Subscription Agreement.

It is important that each potential subscriber become familiar with the facts concerning this project, in order that you may make an intelligent decision as to whether or not to invest as a cooperator in this project.

The subscription agreement sets forth the terms and conditions under which you apply for stock ownership in the Housing Company.

The occupancy agreement specifies the terms and conditions under which a stockholder may occupy one of the apartments in the project.

The Certificate of Incorporation and By-Laws provide authority for and basic methods of operation of the Housing Company.

Each subscriber is advised to consult with his own attorney in order to fully understand the extent of his legal rights and obligations.

THE HOUSING COMPANY

The Housing Company was organized with the consent of the Commissioner in accordance with the provisions of the Limited-Profit Housing Companies Law of the State of New York. As a corporation organized under this statute, the Housing Company is subject to the supervision and control of the Commissioner. No funds of the Housing Company may be expended without the approval of the Commissioner. The Commissioner must also approve all contracts executed by the Housing Company for the construction and operation of the project and is charged by law with the responsibility of keeping informed as to the general condition of the project, its capitalization and the manner in which the project is constructed, leased, operated and managed. This supervision is maintained so long as the Housing Company is subject to the Limited-Profit Housing Companies Law and includes periodic inspection of the project and periodic audit of the books and records of the Housing Company.

At the completion of the construction of the project, the Commissioner is required to determine and certify the total actual final cost of the project. This determination and certification is important since the mortgage loan hereinafter referred to may not exceed 90% of the amount thereof.

THE SITE

The 9,117,600 square feet of land which comprises the project site is located at Baychester, Bronx, New York, at and in the vicinity of the intersections of the Hutchinson River Parkway and the New England Thruway.

This site is to be acquired by the Housing Company at a purchase price of $15,561,312, which price has been approved by the Commissioner. The property comprising the project site is presently under contract of sale dated December 17, 1961 to be purchased by Community Services, Inc., who will either acquire title to the property and convey the same to the Housing Company, or cause the property to be conveyed to the Housing Company at the above mentioned price of $15,561,312, subject to the issuance of a Certificate of Acquisition to the Housing Company by the Commissioner in accordance with the provisions of Section 29, Article II of the Limited-Profit Housing Companies Law of the State of New York.

THE NEIGHBORHOOD

The neighborhood at present consists generally of vacant land. However, the project, when completed, will contain a number of community service centers. In these areas will be shops, community facilities and schools. It is expected that the Board of Education will build three elementary schools and a junior high school within the project area and a new

high school within the vicinity. The City of New York will also have land for other public services. There will be parks, police and fire stations and a library.

The project is served by both the East Side and West Side IRT Subways, bringing people to midtown Manhattan in one hour. There are bus lines to both stations of the subways.

THE PROJECT

The project will be called "Co-op City", and will consist of 39 fire-proof residential buildings varying in height from 21 to 34 stories. All of the apartments as well as the community facilities will be centrally air conditioned. This will be possible because Co-op City will operate its own power plant. The plant will provide the community with its own electric power, hot water, heat and air conditioning.

The project will contain parking facilities to accommodate 10,850 automobiles which will be provided for rental to tenant-cooperators at $17.50 per month.

Approximately 78% of the site will be devoted to open space. This will mean that there will be extensive gardens, sitting areas and playgrounds.

Preliminary plans and specifications have been prepared by Herman J. Jessor, architect. The architect shall be paid $2,350,000 in accordance with a contract to be entered into in such form as the Commissioner may approve.

Copies of the preliminary plans are available or will be made available for examination at the office of the sales agent. The right is reserved, however, to make such changes in the plans and specifications and in the construction and equipment of the building as may be deemed necessary or advisable by the Housing Company, or as may be required or approved by the Commissioner or any municipal, state or federal agencies, departments

BEST COPY AVAILABLE

or authorities. The working drawings are presently in preparation and when completed will be submitted for approval to the Commissioner.

STOCK OWNERSHIP

Occupancy of the residential apartments in the project is limited to stockholders of the Housing Company who must be bona-fide residents of the State of New York and over the age of twenty-one.

When your apartment application has been approved by the Housing Company and the Commissioner, after investigation and documentation of your eligibility as to income, occupancy and credit requirements, you will then be required to pay the full balance of the purchase price for the equity investment allocated to your apartment pursuant to the terms of the subscription agreement which will have been executed.

Each stockholder of the Housing Company, regardless of the amount of his investment and the number of shares or other equity obligations owned, will have one vote on corporate matters in respect of which stockholders are entitled to vote, when the stock is issued in accordance with the terms of the subscription agreement.

The Housing Company will be authorized to issue a sufficient number of shares of common stock, including three shares to be issued to the incorporators-directors, each of the par value of $25., and all except the three shares to be issued to the incorporators-directors will be allocated to the 15,500 apartments of the project. The Housing Company may also issue other equity obligations to be held by the tenant-cooperators in addition to the aforesaid shares.

The entire voting power of the corporation will be vested in Class A stock until the final advance under the Building Loan Agreement has been made, the final payment to contractor has been made under the Construction Contract and the Commissioner has issued a Certificate of Acceptability to the Housing Company after the project has been completed. Thereafter each holder of the Class B stock will have the same voting power as each holder of Class A stock. In all other respects, the Class B stock will have rights equal with and identical to the Class A stock. Each and every holder of the capital stock of the Corporation, by the acceptance of his certificate thereof, irrevocably waives and releases any and all rights to subscribe to any increase in such stock or any part thereof and consents to the issue and disposition of any such increase to such person and upon such terms and conditions as the Board of Directors from time to time may fix and determine, and subject to the approval of the Commissioner, except as otherwise provided by statute.

COOPERATIVE ORGANIZATION

The Housing Company will become the owner of the fee title to the project. Its affairs are governed by the provisions of its Certificate of Incorporation and By-Laws, as the same may be amended from time to time. Copies of these two documents will be furnished by the sales agent to the tenant-cooperator upon demand.

Each of the subscribers to the Certificate of Incorporation (Abraham E. Kazan, Jacob S. Potofsky and Robert Szold) has been approved by the Commissioner and will purchase one share of stock of the Housing Company at the par value thereof. This stock will be surrendered to the Housing Company at the appropriate time.

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

Until the first meeting of the subscribers-stockholders, the Board of Directors will consist of:

Abraham E. Kazan
Jacob S. Potofsky
Louis Stulberg
Robert Szold
Harold Ostroff

all of whom have been approved as Directors by the Commissioner, or such other successor or substitute directors as may, from time to time, be elected and, thereafter, approved by the Commissioner.

All of the officers have been elected by the directors. The present officers of the Housing Company are:

Abraham E. Kazan	*President*
Jacob S. Potofsky	*Vice President*
Louis Stulberg	*Secretary*
Robert Szold	*Treasurer*
Harold Ostroff	*Assistant Sec'y.*

A stockholders' meeting will be called for the election of new directors after the expiration of 30 days from the date the Commissioner or his successor shall have issued a Certificate of Acceptability as provided in the Certificate of Incorporation, at which time, the resignations of all of the then officers and directors will be tendered to the Housing Company.

FINANCING OF PROJECT

The total estimated project cost is $283,695,550.

The funds provided by your purchase of stock and or other equity obligations and those provided by the other purchasers will constitute the equity investment of $32,795,550 and such funds are intended to furnish the difference between: (1) the cost of acquiring the land and constructing the project and providing working capital funds, and (2) the proceeds of a first mortgage loan of $250,900,000.

It is contemplated that the New York State Housing Finance Agency will issue a commitment for financing during construction and for a forty-year, self liquidating permanent mortgage of $250,900,000 or in any event not more than 90% of the actual total project cost at an interest rate to be determined by the cost of borrowing to the Housing Finance Agency plus a proportionate share of its expenses and other charges, as certified by the Agency.

CONSTRUCTION CONTRACT

It is anticipated that the General Contractor for the construction of the project will be Community Services, Inc., of 465 Grand Street, New York 2, New York. The performance of certain sub-contracts to be made with the General Contractor will be insured by a surety company or companies in amounts to be approved by the Commissioner, in favor of the Housing Company, the General Contractor and the New York State Housing Finance Agency.

All construction must meet City Building Code requirements and be acceptable to the Housing Company and the Commissioner.

The construction contract will be executed prior to the mortgage loan closing. The contract will provide for the payment of a lump sum price to the Contractor for the construction of the project, in the amount of $253,678,000, subject to addition or deduction for

change orders during the progress of construction as approved by the Commissioner.

The contract price will include the sum of $2,000,000 for builder's home office overhead, but there will be no builder's fee. The risk of completing the construction within the lump sum price is upon the Contractor. In addition to periodic audits during the progress of construction, the cost of construction will be audited by the Commissioner upon completion of the project to determine the amount, if any, of savings between the lump sum contract price and the cost of construction. Any savings will inure to the benefit of the Housing Company.

For the purpose of determining such savings, if any, the total cost of development will be determined by the Division without regard to the over-run or under-run on any specific item in the schedule of estimated construction costs for the project but the Division will retain the right to determine whether or not any item of actual cost is properly includable in the total cost of the work.

COMPLETION OF PROJECT

When each building is ready for occupancy, the Housing Company will give each subscriber assigned to such building 30 days notice in writing to commence occupancy in the manner directed by the then Managing Agent of the building. Upon acceptance of occupancy or at the expiration of 30 days, whichever is earlier, the member shall commence payment of the carrying charges for the apartment, in accordance with the occupancy agreement.

By the terms of the Subscription Agreement the apartment buildings will be deemed fully completed and the contract between the Housing Company and the Contractor duly and fully performed as soon as both of the following conditions are met:

(a) The final Certificate of Occupancy has been issued by the Department of Housing and Buildings of the City of New York, and

(b) The Commissioner has issued his Certificate of Acceptability to the Housing Company.

OCCUPANCY AGREEMENT

Each subscriber to stock in the Housing Company will be required to execute an occupancy agreement for the apartment to which his stock has been allocated. The form of the occupancy agreement will be available for inspection at the office of the sales agent.

PROCEDURE AND SUBSCRIPTION AGREEMENT

A deposit of $500 will be required from each applicant at the time he executes a subscription agreement and apartment application ("subscription agreement") and affidavits as to income, which can be obtained from the Housing Company.

The equity requirement for each type of apartment will be at the rate of $1,050 per

room. Accordingly, the total equity requirements for such apartments are as follows:

$1,575 for a 3½ room apartment (kitchen, dining room, living room and 1 bedroom, without balcony)

$1,800 for a 4 room apartment (kitchen, dining room, living room and 1 bedroom, with balcony)

$2,025 for a 4½ room apartment (kitchen, dining room, living room and 2 bedrooms, without balcony)

$2,250 for a 5 room apartment (kitchen, dining room, living room and 2 bedrooms, with balcony)

$2,700 for a 6 room apartment (kitchen, dining room, living room and 3 bedrooms, without balcony)

$2,925 for a 6½ room apartment (kitchen, dining room, living room and 3 bedrooms, with balcony)

Upon receipt by the Housing Company of the executed subscription agreement and affidavits as to income and the deposit of $500 from the subscriber, the Housing Company will credit such deposit against the subscription price required to be paid by the subscriber under the subscription agreement for each type of apartment, as above described, as follows:

3½ rooms — $375
4 rooms — $100
4½ rooms — $125
5 rooms — $450
6 rooms — $175
6½ rooms — $500

The balance, if any, of the deposit shall be credited toward the purchase of the full equity requirements referred to herein.

Upon the selection of the particular apartment by the subscriber of the type hereinabove set forth, by the execution of the occupancy agreement referred to herein, he shall invest a further sum equal to the amount of the total equity requirement for his apartment less the amount of the deposit, so that the total amount invested by the subscriber shall be equal to the total equity requirement for his apartment.

The subscriber may withdraw from the subscription agreement at any time prior to selecting the particular apartment which he desires to occupy, and shall, upon such withdrawal, be entitled to a refund, without interest, of all amounts paid thereunder. After the subscriber shall have selected an apartment he may also withdraw from the subscription agreement at any time prior to executing the occupancy agreement (lease) for the apartment and shall, upon such withdrawal, be entitled to a refund, without interest, on all amounts theretofore paid as equity investment, but such refund shall not be paid by the Housing Company to the subscriber until the stock and or other equity obligations subscribed for under the subscription agreement is sold to another applicant and the apartment selected by the subscriber has been assigned to such other applicant.

The Housing Company reserves the right at any time before an occupancy agreement is entered into with the subscriber, for any reason deemed sufficient by the Housing Company, in its sole discretion, subject to the approval of the Commissioner, to repay the amount paid to it by the subscriber. In the event that such repayment shall be made prior to the selection by the subscriber of a particular apartment, or in the event the subscription agreement is not approved by the Commissioner, such repayment shall be made without interest. In the event that such repayment is made after the subscriber shall have so selected an apartment, such repayment shall be made with interest thereon at the rate of 2% per annum from the date of such payments by the subscriber. Upon any such repayment by the Housing Company, all rights of the subscriber under the aforesaid subscription agreement will cease and terminate.

The sub-cription agreement is specifically subject to the provisions of the Limited-Profit Housing Companies Law, the Certificate of Incorporation and By-Laws, the building loan contract, any agreements which may be made or entered into between the Housing Company and the New York State Housing Finance Agency and any and all other contracts, agreements, mortgages, leases and other instruments, and any and all modifications, renewals and extensions thereof entered into by the Housing Company before or after the execution of the subscription agreement, provided that the same have the written approval of the Commissioner. The subscription agreement further provides that all said contracts, agreements, mortgages, leases and other instruments and any and all modifications, renewals and extentions thereof, shall be determined by the Board of Directors of the Housing Company, in its discretion, subject only to the approval of the Commissioner.

Please read the subscription agreement for a more detailed statement of your rights and obligations.

CARRYING CHARGES

It is contemplated that the average monthly carrying charge will be approximately $23.02 per room. This average monthly carrying charge is based on presently estimated construction and operating costs. The Housing Company will make every effort to keep such average monthly carrying charge within such range. However, it is possible that increases in costs may increase the average monthly carrying charge somewhat above the $23.02 per room level.

Many of the apartments will be below the average and many above. The carrying charges on specific apartments are determined by the location and exposure of the apartment.

The average monthly carrying charges do *not* include utilities. The Housing Company will generate its own electric power and the charge therefor will be at as low a rate as possible. If gas is used for cooking, there will be a flat rate per month for gas.

THE APARTMENTS

Final apartment plans are being prepared and will be ready when the subscribers are called to select an apartment.

Applicants who are accepted will be called to select their apartments in the order in which applications are filed. Apartments will be selected from large site plans and floor plans at the Applications Office.

MANAGEMENT

The right to determine the method of management of the Cooperative is vested in the Board of Directors, subject to the approval of

the Commissioner. The present Board of Directors will retain a qualified Managing Agent to serve for one year, subject to replacement

or retention thereafter by the then elected Board of Directors. The choice and qualification of the Managing Agent shall be at all times subject to the approval of the Commissioner.

TAX BENEFITS

The City of New York has agreed to exempt the land and improvements in the completed project from real estate taxes, to the extent of 50% of the value thereof, for a period of not more than 30 years, commencing from the date on which the benefits of such exemption first become available and effective.

The cooperative ownership of the project has been designed to give purchasers of stock the benefits of income tax deductions allowable to tenant-stockholders of cooperative housing corporations under the provisions of Section 216 of the Internal Revenue Code and Section 360 of the New York State Tax Law; however, no representations are made that such deductions will be available to purchasers of stock. The present laws and regulations entitle tenant-stockholders of cooperative housing corporations to deduct from their gross income for Federal and New York State income tax purposes their proportionate share of real estate taxes and interest paid by such cooperative corporations. The actual tax saving to an individual would depend upon the respective taxpayer's income tax bracket.

Neither the sales agent nor the Housing Company makes any warranties or representations that the U.S. Treasury Department or the New York State Department of Taxation and Finance will hold that tenant-stockholders are entitled to the above income tax benefits and they shall not be liable if for any reason it be held that the Housing Company or any transaction does not meet, or at any future time ceases to meet, the requirements of law.

ESTIMATE OF EXPENSES

Schedules of the estimated project cost and of the estimated annual operating expenses and income for the first year of operation of the project, as prepared and approved by the Commissioner, are available for your inspection at the office of the sales agent.

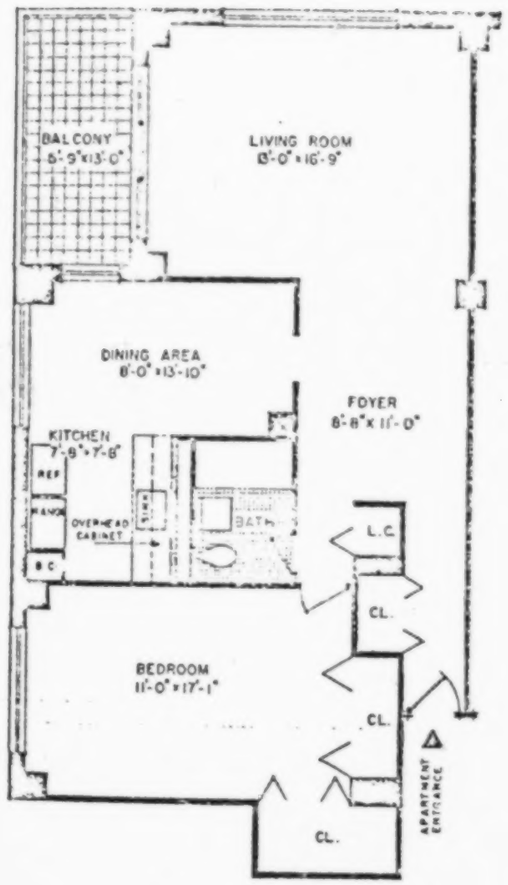
HOUSING COMPANY COUNSEL

The services of the law firm of Szold, Brandwen, Meyers, Blumberg & Altman, of 30 Broad Street, New York, New York, have been procured for the organization of the Housing Company, the acquisition of the site, the preparation of the subscription agreement, the occupancy agreement, this Information Bulletin, and all other matters requiring legal services in connection with the affairs of the Housing Company and the construction and financing of the project, at such fee as the Commissioner shall approve, not to exceed the amount shown in the schedule of the estimated project cost.

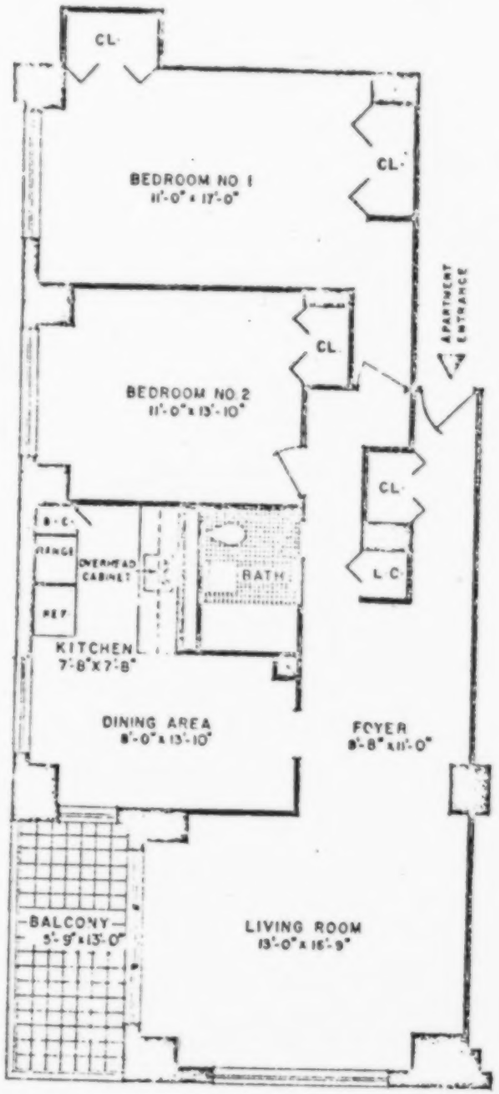
SALES AGENT

Subject to the approval of the Commissioner, Community Services, inc., of 465 Grand Street, New York, New York, has been retained by the Housing Company as sole agent for the sale of stock and/or other equity obligations and apartments in the project, at such fee as the Commissioner shall approve, not to exceed the amount shown in the schedule of the estimated project cost.

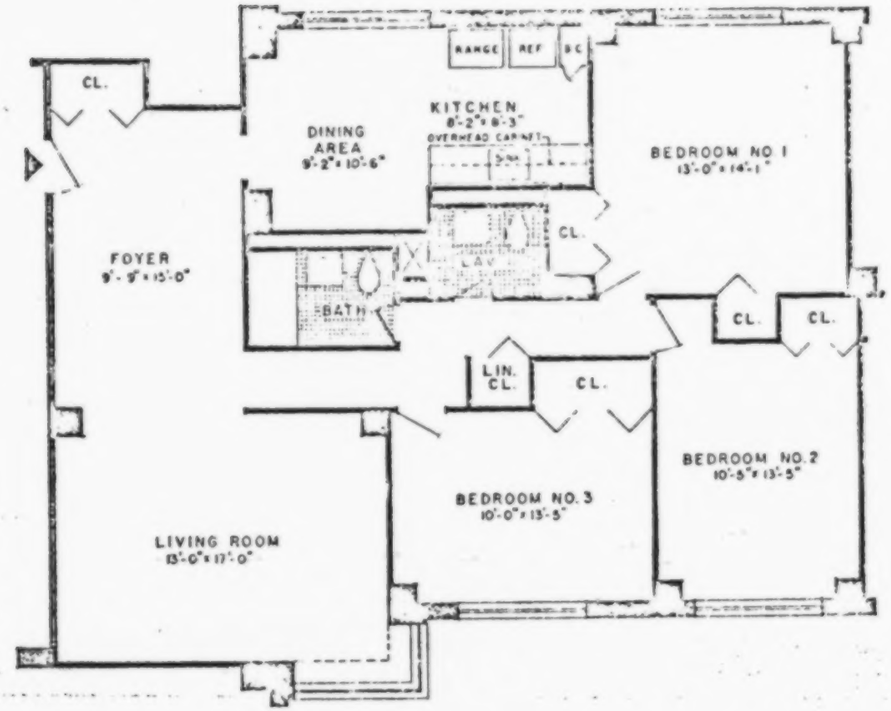
A[illegible]RTMENTS WILL BE SIMILAR TO THESE



3½ ROOM & BALCONY APARTMENT



4½ ROOM & BALCONY APARTMENT



6 ROOM APARTMENT

NOTE Plans are subject to minor modification.

APPLICATIONS

Applications for Co-op City may be filed at the Applications Office of Community Services, Inc., 309 West 23rd Street, New York, New York 10011.

ACCOUNTANT

Subject to the approval of the Commissioner, Apfel & Englander, of 317 Madison Avenue, New York, New York 10017, certified public accountants, will be retained by the Housing Company to supervise the keeping of its accounts, to periodically audit its books and to prepare the financial reports and statements required by the Commissioner, at such fee as the Commissioner shall approve.

INCOME LIMITATIONS

The Commissioner has fixed a maximum annual income for initial occupancy of apartments. If, after initial occupancy, your income should increase above the statutory limitations you may be surcharged in accordance with a schedule approved by the Commissioner.

ONE LAST WORD

Co-op City is being built for the benefit and enjoyment of many people. It has been determined a long time ago, that dogs, as lovely as they may be, are not conducive to enjoyable living in high rise apartment buildings. Dogs and other animals will not be permitted in Co-op City.

Modern laundry rooms will be located in each building. There will be a minimum charge for the use of washing machines and dryers. Individual clothes washing machines will not be permitted in the apartments.

STOCK AND/OR OTHER EQUITY OBLIGATIONS OFFER

The Housing Company invites offers for shares of its capital stock and/or other equity obligations for sale in units which will be allocated to the 15,500 apartments of the development all in accordance with the terms of the subscription agreement. Sales will be limited to bona-fide residents of the State of New York over the age of 21 years.

No person has been authorized to make any representations in connection with this invitation for offers and no representations are or have been authorized to be made other than those herein contained.

CHANGES

No changes may be made in this Information Bulletin unless in writing, signed by a duly authorized officer of the Housing Company and approved by the Commissioner.

Dated: New York
May 12, 1965.

RIVERBAY CORPORATION

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

UNITED HOUSING FOUNDATION

BOARD OF DIRECTORS

IRWIN BARON
Member, Board of Directors
Lenox Hill Neighborhood Association

H. DANIEL CARPENTER
Director
Hudson Guild, Inc.

MORRIS IUSHEWITZ
Secretary
N.Y.C. Central Labor Council
AFL-CIO

ABRAHAM E. KAZAN
President, United Housing Foundation
President, Amalgamated Housing Corp.

PAUL T. O'KEEFE
Member, Board of Directors
Rochdale Village, Inc.

HAROLD OSTROFF
President, Mutual Housing Association Inc.

JACOB S. POTOFSKY
General President
Amalgamated Clothing Workers of America

MARTIN PARBACK
Member, Board of Directors
Seward Park Housing Corp.

MARIAN SAMETH
Member, Board of Directors
Joint Queensview Housing Enterprise, Inc.

WILLIAM STERN
Administrative Director
Workmen's Circle

LOUIS STULBERG
General Secretary-Treasurer
International Ladies' Garment Workers' Union

DAVID SULLIVAN
General President
Building Service Employees International Union

ROBERT SZOLD
President
Hillman Housing Corp.

HARRY VAN ARSDALE, JR.
Vice President, United Housing Foundation
Treasurer, Electchester

CHARLES S. ZIMMERMAN
Vice President
International Ladies' Garment Workers' Union

COOPERATION

COOPERATION MEANS CONCERT FOR THE DIFFUSION OF WEALTH. IT LEAVES NOBODY OUT WHO HELPS TO PRODUCE IT. IT TOUCHES NO MAN'S FORTUNE, IT SEEKS NO PLUNDER, IT CAUSES NO DISTURBANCE IN SOCIETY..... IT CONTEMPLATES NO VIOLENCE, IT SUBVERTS NO ORDER....IT ACCEPTS NO GIFT NOR ASKS ANY FAVOR. IT KEEPS NO TERMS WITH THE IDLE AND IT WILL BREAK NO FAITH WITH THE INDUSTRIOUS..... IT MEANS SELF-RULE, SELF-DEPENDENCE AND SUCH SHARE OF THE COMMON COMPETENCE AS LABOR SHALL EARN OR THOUGHT CAN WIN.....

GEORGE ELLIS BRIGGS
LOWELL, MASSACHUSETTS - 1865

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

BEST COPY AVAILABLE

EXHIBIT "2" - 1965 INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

UNITED HOUSING FOUNDATION

EXHIBIT "3" - 1967 REVISED INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

CO-OP CITY

A NEW TOWN,
OWNED BY ITS RESIDENTS,
DESIGNED FOR FAMILY LIVING

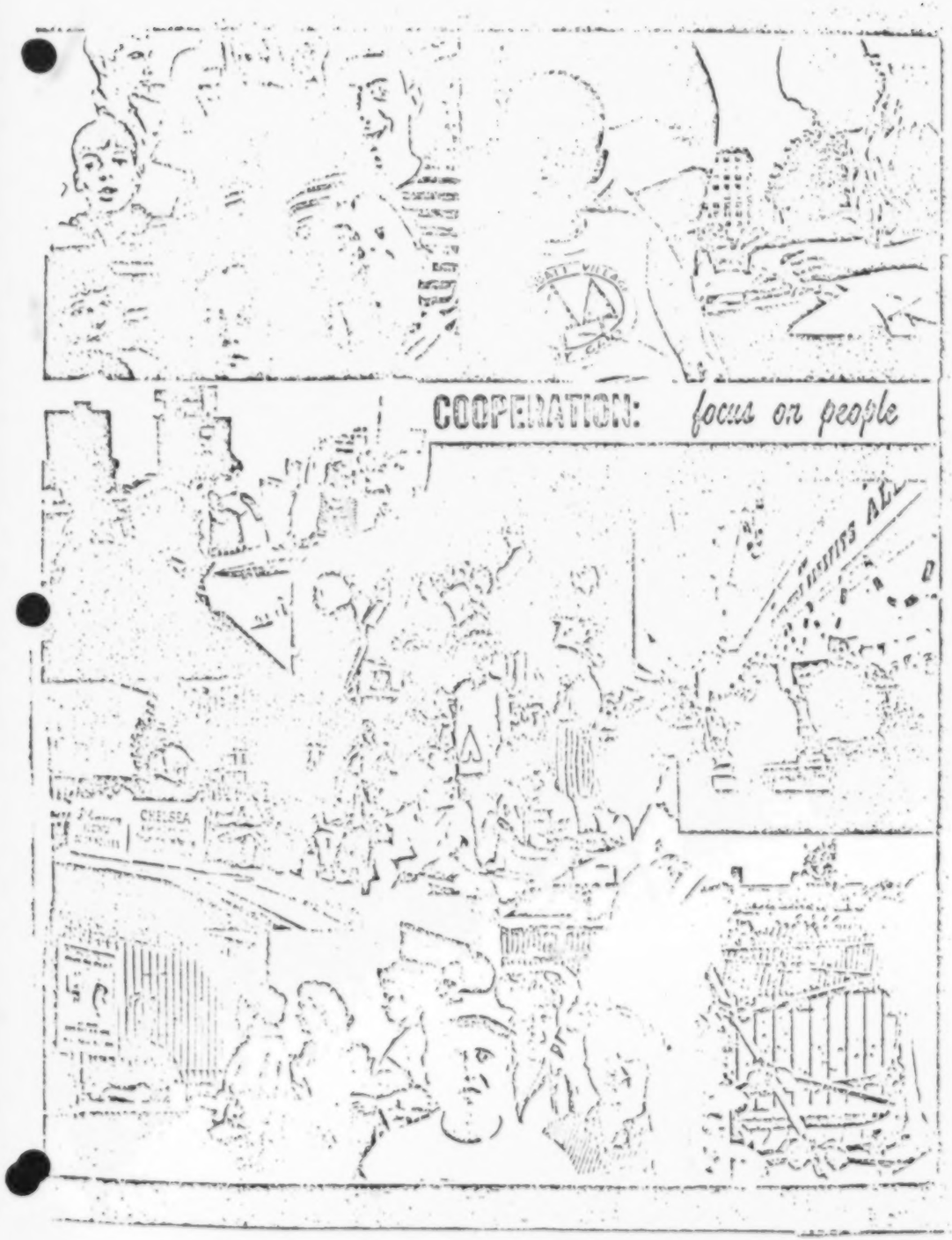


EXHIBIT "3" - 1967 REVISED INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

AA CO-OP CITY
a residential community cooperatively owned and operated

RIVERBAY CORPORATION Applications Office
309 West 23rd Street/ New York, N. Y. 10011 / 924-5115

Dear Applicant:

This will acknowledge your inquiry concerning an application for an apartment in CO-OP CITY (Riverbay Corporation) sponsored by United Housing Foundation.

This Information Bulletin and descriptive brochure will tell you about CO-OP CITY. An application and two copies of a Subscription Agreement are enclosed.

The application and one copy of the Subscription Agreement should be mailed back to our office with a check for $500 payable to "Riverbay Corporation"; the second copy of the Subscription Agreement is for your files.

Applicants are called to select apartments in the order in which they have made their deposits. We hope we will be able to assist you with your housing needs.

Cooperatively yours,

Harold Ostroff
President

(APPLICATION BLANK IN CENTERFOLD)

THE UNITED HOUSING FOUNDATION is a federation of housing cooperatives, civic groups, labor unions and other non-profit organizations. Its purpose is to acquaint people with the opportunities and advantages of home ownership by using the cooperative method. The housing organizations affiliated with the United Housing Foundation represent over 26,000 families who enjoy the benefits of cooperative home ownership.

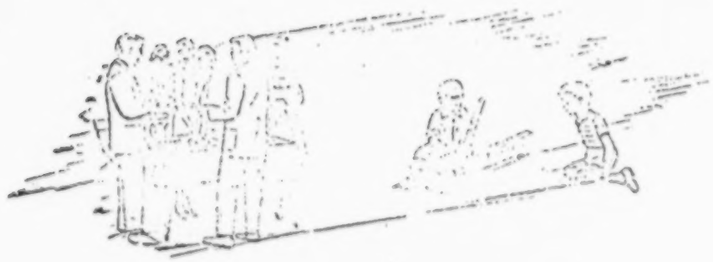
The shortage of housing in the New York area is a great problem to the average family. It is also a community problem. Thousands of families have found that only by joining a cooperative organization they can collectively help themselves.

The United Housing Foundation has initiated and sponsored a number of developments. These include, among others, the 1,672 unit ILGWU Cooperative Village, the Penn Station South Cooperative with 2,820 units, the Seward Park Houses with 1,728 units, the 2,585 unit Amalgamated-Warbasse Houses, and Rochdale Village with 5,860 apartments.

In its program to develop more moderate-cost housing the Foundation is sponsoring Co-op City for 15,372 families. The purpose of this booklet is to acquaint you with the plans for that cooperative.

MEMBER OF THE COOPERATIVE LEAGUE OF THE USA.

EXHIBIT "3" - 1967 REVISED INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON



The Advantages of Cooperative Housing

People find living in a cooperative community enjoyable for more than one reason. Most people join, however, for the simple reason that it is a way to obtain decent housing at a reasonable price. However, there are other advantages. The purpose of a cooperative is to provide home ownership, not just apartments to rent. The community is designed to provide a favorable environment for family and community living. If you have lived in a private apartment house you were the tenant and someone else the landlord. The landlord's interest was in financial gain. There was no common interest between the tenants. You may have lived in the same apartment for years without getting to know your neighbors.

The common bond of collective ownership which you share makes living in a cooperative different. It is a community of neighbors. Home ownership, common interests and the community atmosphere make living in a cooperative like living in a small town. As a rule there is very little turnover in a cooperative.

There is another, rather intangible factor, which appeals to many people. It is being a part of a group working for common purposes to benefit all. In many cooperatives the self-help method which made the housing possible is extended to meet the needs of consumers in other fields. It is not uncommon for cooperators to organize cooperative foodmarkets, credit unions, nursery schools, insurance plans, health plans, — all designed to benefit themselves.

At the time of apartment selection, applicants will be requested to make a loan to the United Housing Foundation, Inc. in the amount of $10.00 per rental room. This loan will be used to enable the Foundation to continue its assistance to Co-op City and other housing developments, and their members, and will be evidenced by a note of United Housing Foundation, Inc. to the applicant repayable upon the termination of the tenant-cooperator's occupancy in the development, with interest at the rate of 2 per cent per annum. In the event the applicant withdraws from the subscription agreement at any time prior to entering into the occupancy agreement, such loans shall be repaid to him at such time with interest at the foregoing rate.

The investment a person makes in a cooperative often represents a large share of his life's savings. To insure the investment against a time when there might not be an applicant for the apartment a special reserve fund will be established. Tenant-cooperators will be required to make payments, at the time they pay their carrying charges, of fifty cents per room, per month, to this reserve fund; the payments will continue until it is determined that sufficient reserves have been established. This fund will be used exclusively for the repurchase of stock in the event no other purchasers are available.

BEST COPY AVAILABLE

INFORMATION BULLETIN

RIVERBAY CORPORATION
(CO-OP CITY)

A Limited-Profit Housing Community Supervised By The Commissioner of Housing and Community Renewal of The State of New York.

Sponsor:	UNITED HOUSING FOUNDATION, INC. 465 Grand Street New York, New York 10002
Contractor:	COMMUNITY SERVICES, INC. 465 Grand Street New York, New York 10002
Attorneys:	SZOLD, BRANDWEN, MEYERS & ALTMAN 30 Broad Street New York, New York 10004
Architect:	HERMAN J. JESSOR 465 Grand Street New York, New York 10002
Supervised By:	DIVISION OF HOUSING AND COMMUNITY RENEWAL OF THE STATE OF NEW YORK James Wm. Gaynor Commissioner
Mortgage Financing By:	NEW YORK STATE HOUSING FINANCE AGENCY
Partial Tax Exemption Granted by:	THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK

Dated: May 12, 1965
Revised: May 15, 1967

This Bulletin has been prepared by the Housing Company (hereinafter called the "Cooperative") for the information of prospective subscribers. All contracts and agreements referred to herein and all development costs are subject to review, audit and final approval by the Commissioner of Housing and Community Renewal of the State of New York (hereinafter called the "Commissioner"), and to such changes as the Commissioner may require or approve.

EXHIBIT "3" - 1967 REVISED INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCOPE OF THIS BULLETIN

A subscription for membership in a housing cooperative is the first step toward your participation in the cooperative ownership of a real estate development, which involves risks and responsibilities, as well as rights and privileges. This Bulletin is intended to provide some of the basic information concerning this cooperative. In addition, you should familiarize yourself with the Certificate of Incorporation and any amendments thereto, By-Laws, occupancy agreement, subscription agreement, minutes of meetings of incorporators and directors and the several contracts referred to herein, copies of which are now available, or will be made available, for your inspection at the office of the sales agent. It is urged that you consult the above documents prior to the time of your signing the subscription agreement.

It is important that each potential subscriber become familiar with the facts concerning Co-op City, in order that you may make an intelligent decision as to whether or not to invest as a cooperator in this development.

The subscription agreement sets forth the terms and conditions under which you apply for stock ownership in the Cooperative.

The occupancy agreement specifies the terms and conditions under which a stockholder may occupy one of the apartments in the development.

The Certificate of Incorporation and By-Laws provide authority for and basic methods of operation of the Cooperative.

Each subscriber is advised to consult with his own attorney in order to fully understand the extent of his legal rights and obligations.

RIVERBAY CORPORATION, THE COOPERATIVE

Riverbay Corporation (Co-op City) was organized with the consent of the Commissioner in accordance with the provisions of the Limited-Profit Housing Companies Law of the State of New York. As a corporation organized under this statute, the Cooperative is subject to the supervision and control of the Commissioner. No funds of the Cooperative may be expended without the approval of the Commissioner. The Commissioner must also approve all contracts executed by the Cooperative for the construction and operation of the development and is charged by law with the responsibility of keeping informed as to the general condition of the development, its capitalization and the manner in which the development is constructed, leased, operated and managed. This supervision is maintained so long as the Cooperative is subject to the Limited-Profit Housing Companies Law and includes periodic inspection of the development and periodic audit of the books and records of the Cooperative.

At the completion of the construction of the development, the Commissioner is required to determine and certify the total actual final cost of the development. This determination and certification is important since the mortgage loan hereinafter referred to may not exceed 90% of the amount thereof.

THE SITE

The 9,186,800 square feet of land which comprises the development site is located at Baychester, Bronx, New York, at and in the vicinity of the intersections of the Hutchinson River Parkway and the New England Thruway.

This site was acquired by the Cooperative on July 15, 1965 at a cost of $16,013,982, which cost was approved by the Commissioner pursuant to a Certificate of Acquisition issued by the Commissioner in accordance with the provisions of Section 29, Article II of the Limited-

Profit Housing Companies Law of the State of New York.

THE NEIGHBORHOOD

The neighborhood at present consists generally of vacant land. However, Co-op City, when completed, will contain a number of community service centers. In these areas will be shops, community facilities and schools. It is expected that the Board of Education will build three elementary schools, two intermediate schools and a high school within the community. The City of New York will also have land for other public services. There will be parks, a fire station and a library.

The Community is served by both the East Side and West Side IRT Subways and the IND Subway, bringing people to midtown Manhattan in one hour. There are bus lines to the subway stations.

CO-OP CITY — THE PHYSICAL PLAN

The development will be called "Co-op City", and will consist of 35 fire-proof residential buildings varying in height from 24 to 33 stories and 236 3-story town houses. All of the apartments as well as the community facilities will be centrally air conditioned. A central power plant will provide the community with its own hot water, heat, air conditioning and emergency electric power.

The development will contain parking facilities to accommodate 10,350 automobiles which will be provided for rental to tenant-cooperators at $15.00 per month.

Approximately 82% of the site will be devoted to open space. This will mean that there will be extensive gardens, sitting areas and playgrounds.

Plans and specifications have been prepared by Herman J. Jessor, architect. The architect shall be paid $2,559,000 in accordance with a contract between the Cooperative and the architect and approved by the Commissioner.

Copies of the plans are available or will be made available for examination at the office of Community Services, Inc., the sales representative. The right is reserved, however, to make such changes in the plans and specifications and in the construction and equipment of the building as may be deemed necessary or advisable by the Cooperative, or as may be required or approved by the Commissioner or any municipal, state or federal agencies, departments or authorities. The working drawings are presently in preparation and when completed will be submitted for approval to the Commissioner.

COOPERATIVE MEMBERSHIP (STOCK OWNERSHIP)

Occupancy of the residential apartments in the development is limited to stockholders of the Cooperative, who must be bonafide residents of the State of New York and over the age of twenty-one.

When your apartment application has been approved by the Cooperative and the Commissioner, after investigation and documentation of your eligibility as to income, occupancy and credit requirements, you will then be required to pay the full balance of the purchase price for the equity investment allocated to your apartment pursuant to the terms of the subscription agreement which will have been executed.

Each stockholder-member of the Cooperative, regardless of the amount of his investment and the number of shares or other equity obligations owned, will have one vote on corporate matters in respect of which stockholders are entitled to vote, when the stock is issued in accordance with the terms of the subscription agreement.

The Cooperative is authorized to issue a sufficient number of shares of common stock,

including three shares to be issued to the incorporators, each of the par value of $25., and all except the three shares to be issued to the incorporators will be allocated to the 15,372 apartments of the development. The Cooperative may also issue other equity obligations to be held by the tenant-cooperators in addition to the aforesaid shares.

The entire voting power of the corporation will be vested in Class A stock until the final advance under the Building Loan Agreement has been made, the final payment to the contractor has been made under the Construction Contract and the Commissioner has issued a Certificate of Acceptability to the Cooperative after the development has been completed. Thereafter each holder of the Class B stock will have the same voting power as each holder of Class A stock. In all other respects, the Class B stock will have rights equal with and identical to the Class A stock. Each and every holder of the capital stock of the Corporation, by the acceptance of his certificate thereof, irrevocably waives and releases any and all rights to subscribe to any increase in such stock or any part thereof and consents to the issue and disposition of any such increase to such person and upon such terms and conditions as the Board of Directors from time to time may fix and determine, and subject to the approval of the Commissioner, except as otherwise provided by statute.

COOPERATIVE ORGANIZATION

The Cooperative is the owner of the fee title to the development. Its affairs are governed by the provisions of its Certificate of Incorporation and By-Laws, as the same may be amended from time to time. Copies of these two documents will be furnished by the sales representative to the tenant-cooperator upon demand.

Each of the subscribers to the Certificate of Incorporation (Abraham E. Kazan, Jacob S. Potofsky and Robert Szold) has been approved by the Commissioner and has purchased one share of stock of the Cooperative at the par value thereof. This stock will be surrendered to the Cooperative at the appropriate time.

Until the first meeting of the Class B stockholders, the Board of Directors will consist of:

Jacob S. Potofsky
Louis Stulberg
Robert Szold
Harold Ostroff
Gerald Coleman
Seymour Klanfer
Paul T. O'Keefe
Albert Shanker
Jacob Sheinkman

all of whom have been approved as Directors by the Commissioner, or such other successor or substitute directors as may, from time to time, be elected and, thereafter, approved by the Commissioner.

All of the officers have been elected by the directors. The present officers of the Cooperative are:

Harold Ostroff ..... *President*
Jacob S. Potofsky ..... *Vice President*
George Scheehter ..... *Vice President*
Louis Stulberg ..... *Secretary*
Robert Szold ..... *Treasurer*
Irving J. Alter .... *Assistant Secretary*
Paul Kramer .... *Assistant Treasurer*

New directors will be elected in accordance with the provisions of the By-Laws of the Cooperative after the expiration of 30 days from the date the Commissioner or his successor shall have issued a Certificate of Acceptability as provided in the Certificate of Incorporation, at which time, the resignations of all of the then officers and directors will be tendered to the Cooperative.

FINANCING OF CO-OP CITY

The total estimated development cost is $293,803,200.

The funds provided by your purchase of stock and/or other equity obligations and those provided by the other purchasers will constitute the equity investment of $32,503,200 and such funds are intended to furnish the difference between: (1) the cost of acquiring the land and constructing the development and providing working capital funds, and (2) the proceeds of a first mortgage loan of $261,000,000.

The New York State Housing Finance Agency has granted a mortgage loan for financing during construction and for a forty-year, self-liquidating permanent mortgage of $261,600,000 or in any event not more than 90% of the actual total development cost, at an interest rate to be determined by the cost of borrowing to the Housing Finance Agency plus a proportionate share of its expenses and other charges, as certified by the Agency.

CONSTRUCTION CONTRACT

The General Contractor for the construction of the development is Community Services, Inc., of 465 Grand Street, New York, New York 10002. The performance of certain subcontracts to be made with the General Contractor will be insured by a surety company or companies in amounts to be approved by the Commissioner, in favor of the Cooperative, the General Contractor and the New York State Housing Finance Agency.

All construction must meet City Building Code requirements and be acceptable to the Cooperative and the Commissioner.

The construction contract provides for the payment of a lump sum price to the General Contractor for the construction of the development, in the amount of $267,830,750, subject to addition or deduction for change orders during the progress of construction as approved by the Commissioner.

The contract price includes the sum of $2,000,000 for builder's home office overhead, but there will be no builder's fee. The risk of completing the construction within the lump sum price is upon the Contractor. In addition to periodic audits during the progress of construction, the cost of construction will be audited by the Commissioner upon completion of the development to determine the amount, if any, of savings between the lump sum contract price and the cost of construction. Any savings will inure to the benefit of the Cooperative.

For the purpose of determining such savings, if any, the total cost of development will be determined by the Division without regard to the over-run or under-run on any specific item in the schedule of estimated construction costs for the development but the Division will retain the right to determine whether or not any item of actual cost is properly includable in the total cost of the work.

COMPLETION OF DEVELOPMENT

When each building is ready for occupancy, each subscriber assigned to such building will be given 30 days notice in writing to commence occupancy in the manner directed by the Cooperative or its representative. Upon acceptance of occupancy or at the expiration of 30 days, whichever is earlier, the member shall commence payment of the carrying charges for the apartment, in accordance with the occupancy agreement.

By the terms of the subscription agreement the apartment buildings will be deemed fully completed and the contract between the Cooperative and the Contractor duly and fully performed as soon as both of the following conditions are met:

(a) The final Certificate of Occupancy has been issued by the Department of Housing and Buildings of the City of New York, and

(b) The Commissioner has issued his Certificate of Acceptability to the Cooperative.

OCCUPANCY AGREEMENT

Each subscriber to stock in the Cooperative will be required to execute an occupancy agreement for the apartment to which his stock has been allocated. The form of the occupancy agreement will be available for inspection at the office of the sales representative.

PROCEDURE AND SUBSCRIPTION AGREEMENT

A deposit of $500 will be required from each applicant at the time he executes a subscription agreement and apartment application ("subscription agreement") and affidavits as to income, which can be obtained from the Cooperative.

The equity requirement for each type of apartment will be at the rate of $450 per room. The total equity requirements for such apartments are as follows:

TYPE	*TOTAL EQUITY REQUIREMENT*	*DESCRIPTION OF APARTMENTS*
A	$1,350	1 bedroom apartment with kitchen and living room, without balcony. (3 Rooms)
B	$1,575	1 bedroom apartment with kitchen, dining room and living room, without balcony. (3½ Rooms)
C	$1,800	1 bedroom apartment with kitchen, dining room and living room, with balcony. (4 Rms.)
D	$2,025	2 bedroom apartment with kitchen, dining room and living room, without balcony. (4½ Rooms)
E	$2,250	2 bedroom apartment with kitchen, dining room and living room, with balcony. (5 Rms.)
F	$2,700	3 bedroom apartment with kitchen, dining room and living room, without balcony. (6 Rooms)
G	$2,925	3 bedroom apartment with kitchen, dining room and living room, with balcony (6½ Rooms)
H	$3,150	3 bedroom town house apartment with kitchen, dining room and living room, with balcony. (7 Rooms)

Upon receipt by the Cooperative of the executed subscription agreement and affidavits as to income and the deposit of $500 from the subscriber, the Cooperative will credit such deposit against the subscription price required to be paid by the subscriber under the subscription agreement for each type of apartment, as above described, as follows:

Type A – $375
Type B – $375
Type C – $400
Type D – $425
Type E – $450
Type F – $475
Type G – $500
Type H – $500

The balance, if any, of the deposit shall be credited toward the purchase of the full equity requirements referred to herein.

Upon the selection of the particular apartment by the subscriber of the type hereinabove set forth, he shall invest a further sum equal to the amount of the total equity requirement for his apartment less the amount of the deposit, so that the total amount invested by the subscriber shall be equal to the total equity requirement for his apartment.

The subscriber may withdraw from the subscription agreement at any time prior to selecting the particular apartment which he desires to occupy, and shall, upon such withdrawal, be entitled to a refund, without interest, of all amounts paid thereunder. After the subscriber shall have selected an apartment he may also withdraw from the subscription agreement at any time prior to executing the occupancy

agreement (lease) for the apartment and shall, upon such withdrawal, be entitled to a refund, without interest, on all amounts theretofore paid as equity investment, but such refund shall not be paid by the Cooperative to the subscriber until the stock and/or other equity obligations subscribed for under the subscription agreement is sold to another applicant and the apartment selected by the subscriber has been assigned to such other applicant.

If the premises shall have been painted to the specifications of a withdrawing subscriber and as a result of such withdrawal, it will be necessary to repaint to make the apartment suitable for another subscriber, the cost of such repainting shall be deducted from the deposit, such cost to be approved by the Commissioner.

The Cooperative reserves the right at any time before an occupancy agreement is entered into with the subscriber, for any reason deemed sufficient by the Cooperative, in its sole discretion, subject to the approval of the Commissioner, to repay the amount paid to it by the subscriber. In the event that such repayment shall be made prior to the selection by the subscriber of a particular apartment, or in the event the subscription agreement is not approved by the Commissioner, such repayment shall be made without interest. In the event that such repayment is made after the subscriber shall have so selected an apartment, such repayment shall be made with interest thereon at the rate of 2% per annum from the date of such payments by the subscriber. Upon any such repayment by the Cooperative, all rights of the subscriber under the aforesaid subscription agreement will cease and terminate.

The subscription agreement is specifically subject to the provisions of the Limited-Profit Housing Companies Law, the Certificate of Incorporation and By-Laws, the building loan contract, any agreements which may be made or entered into between the Cooperative and the New York State Housing Finance Agency and any and all other contracts, agreements, mortgages, leases, and other instruments, and any and all modifications, renewals and extensions thereof entered into by the Cooperative before or after the execution of the subscription agreement, provided that the same have the written approval of the Commissioner. The subscription agreement further provides that all said contracts, agreements, mortgages, leases and other instruments and any and all modifications, renewals and extensions thereof, shall be determined by the Board of Directors of the Cooperative, in its discretion, subject only to the approval of the Commissioner.

Please read the subscription agreement for a more detailed statement of your rights and obligations.

MONTHLY CARRYING CHARGES

It is contemplated that the average monthly carrying charge for the entire development will be approximately $25.00 per room. This average monthly carrying charge is based on presently estimated construction and operating costs. The Cooperative will make every effort to keep such average monthly carrying charge within such range. However, it is possible that increases in costs may increase the average monthly carrying charge somewhat above the aforesaid level.

Many of the apartments will be below the average and many above. The carrying charges on specific apartments are determined by the location and exposure of the apartment.

The average monthly carrying charges do *not* include utilities. The Cooperative will purchase electric power and gas and will charge an additional monthly adjustment for these utilities averaging approximately $2.32 per room.

THE APARTMENTS

Final apartment plans are available for the subscribers called to select apartments.

Applicants who are accepted will be called to select their apartments in the order in which applications are filed. Apartments will be selected from large site plans and floor plans at the Applications Office.

MANAGEMENT

The right to determine the method of management of the Cooperative is vested in the Board of Directors, subject to the approval of

the Commissioner. The present Board of Directors will retain qualified management to serve for one year, subject to replacement or retentions thereafter by the then elected Board of Directors. The choice and qualification of the management shall be at all times subject to the approval of the Commissioner.

TAX BENEFITS

The City of New York has agreed to exempt the land and improvements in the completed development from real estate taxes, to the extent of 50% of the value thereof, for a period of not more than 30 years, commencing from the date on which the benefits of such exemption first become available and effective.

The cooperative ownership of the development has been designed to give purchasers of stock the benefits of income tax deductions allowable to tenant-stockholders of cooperative housing corporations under the provisions of Section 216 of the Internal Revenue Code; however, no representations are made that such deductions will be available to purchasers of stock. The present laws and regulations entitle tenant-stockholders of cooperative housing corporations who itemize their deductions, to deduct from their gross income for Federal, New York State and New York City income tax purposes their proportionate share of real estate taxes and interest paid by such cooperative corporations. The actual tax saving to an individual would depend upon the respective taxpayer's income tax bracket.

Neither the sales representative nor the Cooperative makes any warranties or representations that the various taxing authorities will hold that tenant-stockholders are entitled to the above income tax benefits and they shall not be liable if for any reason it be held that the Cooperative or any transaction does not meet, or at any future time ceases to meet, the requirements of law.

ESTIMATE OF EXPENSES

Schedules of the estimated development cost and of the estimated annual operating expenses and income for the first year of operation of the development, as prepared and approved by the Commissioner, are available for your inspection at the office of the sales representative.

COUNSEL FOR THE COOPERATIVE

The services of the law firm of Szold, Brandwen, Meyers & Altman, of 30 Broad Street, New York, New York, have been procured for the organization of the Cooperative, the acquisition of the site, the preparation of the subscription agreement, the occupancy agreement, this Information Bulletin, and all other matters requiring legal services in connection with the affairs of the Cooperative and the construction and financing of the development, at a fee approved by the Commissioner and shown in the schedule of the estimated development cost.

SALES REPRESENTATIVE

Community Services, Inc., of 465 Grand Street, New York, New York, has been retained by the Cooperative as sole agent for the sale of stock and/or other equity obligations and apartments in the development, at a fee approved by the Commissioner and shown in the schedule of the estimated development cost.

BEST COPY AVAILABLE

APPLICATIONS

Applications for Co-op City may be filed at the Applications Office of Community Services, Inc., 309 West 23rd Street, New York, New York 10011.

ACCOUNTANT

Apfel & Englander, of 347 Madison Avenue, New York, New York 10017, certified public accountants, have been retained by the Co-operative to supervise the keeping of its accounts, to periodically audit its books and to prepare the financial reports and statements required by the Commissioner, at such fee as the Commissioner shall approve.

INCOME LIMITATIONS

The Commissioner has fixed a maximum annual income for initial occupancy of apartments. If, after initial occupancy, your income should increase above the statutory limitations you may be surcharged in accordance with a schedule approved by the Commissioner.

ONE LAST WORD

Co-op City is being built for the benefit and enjoyment of many people. It has been determined a long time ago, that dogs, as lovely as they may be, are not conducive to enjoyable living in a development such as Co-op City. Dogs and other animals will not be permitted in Co-op City.

Modern laundry rooms will be located in each high-rise building. There will be a minimum charge for the use of washing machines and dryers. Individual clothes washing machines will not be permitted in the high-rise apartments.

STOCK AND/OR OTHER EQUITY OBLIGATIONS OFFER

The Cooperative invites offers for shares of its capital stock and/or other equity obligations for sale in units which will be allocated to the 15,372 apartments of the development all in accordance with the terms of the subscription agreement. Sales will be limited to bonafide residents of the State of New York over the age of 21 years.

No person has been authorized to make any representations in connection with this invitation for offers and no representations are or have been authorized to be made other than those herein contained.

CHANGES

No changes may be made in this Information Bulletin unless in writing, signed by a duly authorized officer of the Cooperative and approved by the Commissioner.

Dated: New York, New York
May 15, 1967.

(Revision of May 12, 1965 Information Bulletin)

RIVERBAY CORPORATION
(CO-OP CITY)

CO-OP CITY
Applications Office, 309 West 23rd Street, at 8th Avenue, Manhattan
Telephone No. 924-5115

EXHIBIT "3" - 1967 REVISED INFORMATION BULLETIN -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

HOW TO APPLY

1. Remove APPLICATION from centerfold, fill out completely, and sign.
2. Remove two copies of SUBSCRIPTION AGREEMENT from centerfold, and sign.
3. Mail completed and signed APPLICATION and a signed copy of SUBSCRIPTION AGREEMENT, with check for $500.00 deposit, payable to Riverbay Corporation, to

BEST COPY AVAILABLE

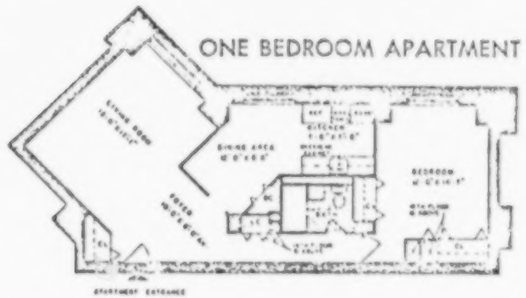
NOTE: The deposit required with application is $500.00, which will be applied toward the *full* required investment in accord with the terms of the enclosed Subscription Agreement.

CO-OP CITY APPLICATIONS OFFICE
309 W. 23rd St.
New York, New York 10011

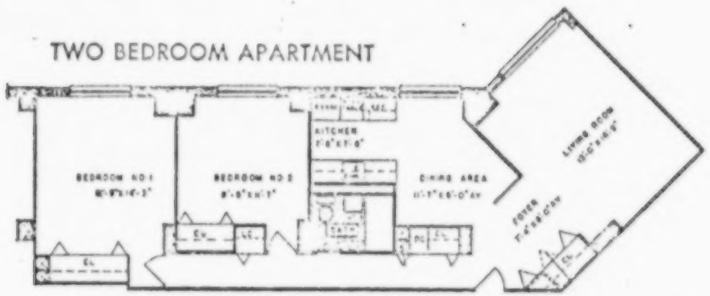
TYPICAL CO-OP CITY APARTMENTS

PLANS include one, two, and three bedroom apartments, with and without balconies.

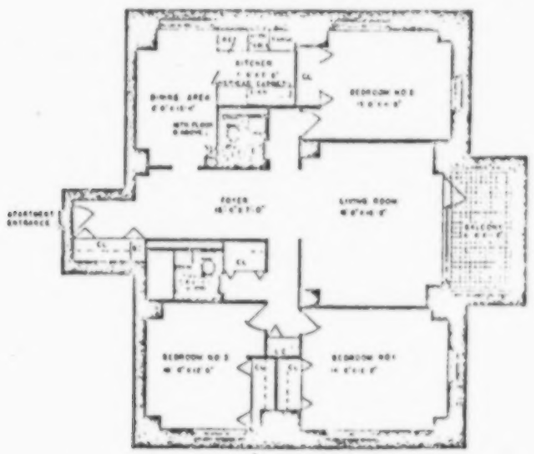
ONE BEDROOM APARTMENT



TWO BEDROOM APARTMENT



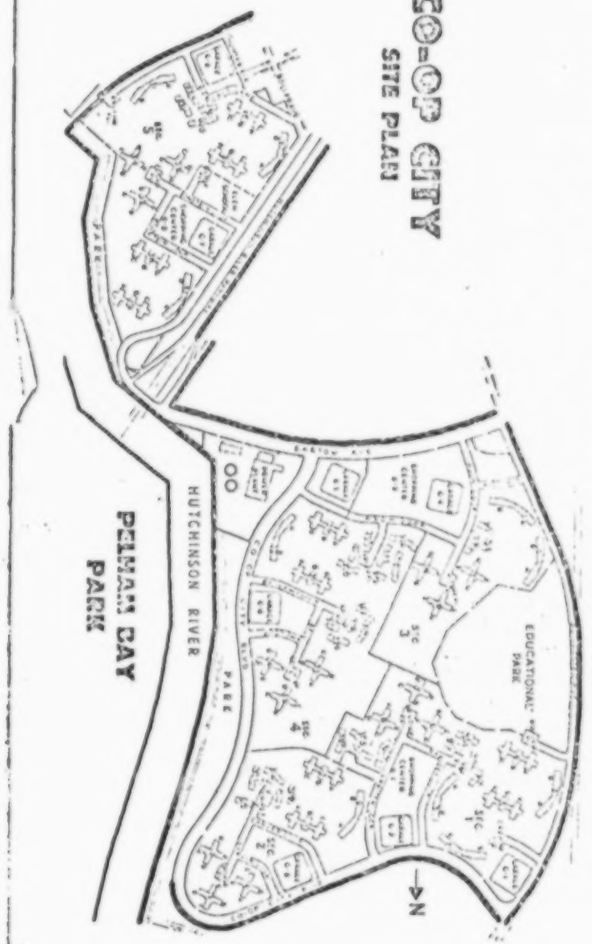
THREE BEDROOM APARTMENT



Buildings vary in size, shape, and height.

CO-OP CITY
309 WEST 23rd STREET
NEW YORK, N.Y. 10011

CO-OP CITY
SITE PLAN



Third Class Mail

CO-OP CITY
RIVERBAY CORPORATION
A COOPERATIVE HOUSING DEVELOPMENT

APT. # _____

Acc't. No. _____

No. of Rooms Desired: _____

APPLICATION FOR APARTMENT

I. IDENTIFYING INFORMATION

NAME _____ PHONE _____

ADDRESS _____

II. FAMILY COMPOSITION

Persons to Reside in Apt.	Relationship	Occupation	Date of Birth	Sex	Employed? Yes	No
1						
2						
3						
4						
5						
6						

III. EMPLOYMENT AND INCOME FOR EACH WAGE EARNER

Employer	Period of Employment	Current Pay	Earnings Last Year	Estimate Next Year
1 Name / Address		$	$	$
2 Name / Address		$	$	$
3 Name / Address		$	$	$

Total Annual Earnings $ _____

Other Income (includes bank interest and stock dividends)

_____ $ _____

_____ $ _____

Total Income $ _____

IV. REAL PROPERTY (Specify and Describe)

_____

_____

	Name	Address
V. REFERENCES: Personal		
Business		
Bank		

VI. GENERAL REMARKS: _____

The above information is correct to the best of my/our knowledge. I/we have no objection to inquiries for the purpose of verifying the facts herein stated.

Signed _____

Date _____ Signed _____

As Joint Tenants with Rights of Survivorship

This application is taken subject to provisions of an "Apartment Subscription Agreement" to be entered into and to the approval of the State Division of Housing.

Prepared in the office of the Corporation.

For Office Use Only

Down Payment
$ _____

Carrying Charge
$ _____

No. in Family
_____ persons

Size of Unit Required
_____ rooms

Applicable Ratio
6 x _____
7 x _____

Maximum Income Limit for size apartment
$ _____

Eligible _____

Ineligible _____

200a

actually inserted at centerfold of Bulletin

EXHIBIT "3" 1967 REVISED INFORMATION BULLETIN - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

(Application for Apartment, attached hereto, and Subscription Agreement and Apartment Application, reproduced herein at pages 104a to 107a were actually inserted at centerfold of Bulletin)

Construction Contract - For City

HCLP No. 64-571...

THIS CONTRACT made as of the 18th day of June, 1965, between

COMMUNITY SERVICES, INC.,

hereinafter referred to as "Contractor," a domestic Corporation authorized to do business in the State of New York having an office at 465 Grand Street, New York, New York

and RIVERBAY CORPORATION

hereinafter referred to as "Owner," a domestic corporation organized and existing under and by virtue of the Limited Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York;

WITNESSETH, that the Contractor and the Owner for the consideration hereinafter set forth, agree as follows:

ARTICLE 1 — Scope of Work

The Contractors shall furnish all of the materials and perform all of the work required by the Contract Documents in connection with the erection and equipping of certain buildings and improvements (hereinafter referred to as the "Project") on a site generally bounded by the Hutchinson River Parkway, the New England Thruway and the Hutchinson River, in the Borough of The Bronx, City of New York, and more particularly described and delineated in said Contract Documents which consist of the following:

(a) Preliminary Plans and Specifications and Addendum, dated as of the 18th day of June, 1965, approved by the Commissioner of Housing and Community Renewal (hereinafter referred to as the "Commissioner"), as of the 18th day of June, 1965, and any Drawings and the Final Plans and Specifications hereafter approved by the Commissioner.

The Specifications shall include the General Conditions of the Contract for the Construction of Buildings, (hereinafter referred to as the "General Conditions"), consisting of Articles 1 through 44, Standard Form, current edition of the American Institute of Architects (except as specifically modified in the Supplementary General Conditions attached to said Specifications, or by this Contract), all of which are made a part hereof as if fully set forth herein. If anything in said General Conditions or said Supplementary General Conditions is inconsistent with this Contract, then this Contract will govern. The Preliminary Plans and Specifications have been prepared by Herman J. Jessar, (hereinafter called the "Architect." A duplicate original of said Preliminary Plans and Specifications and Addendum, dated as of the 18th day of June, 1965, entitled "Preliminary Plans and Specifications for Co-op City" and any Drawings and the Final Plans and Specifications shall be placed on file with the Division of Housing and Community Renewal, (hereinafter referred to as

the "Division"), and when so filed shall govern in the manner hereinbefore provided (except as may be modified by the Final Plans and Specifications and Drawings prior to the performance by the Contractor of any stage of construction referred to in Article 2 hereof and as may be modified under Article 12 hereof) in all matters which may arise with respect to any Drawings, Plans, Specifications, General Conditions and Supplementary General Conditions and the provisions thereof.

(b) This instrument and exhibits hereto attached or herein referred to.

(c) Payment and Performance Bonds in the form attached herewith as Exhibit I. Said bonds shall be in such amounts and applicable to such subcontracts of the Contractor as the Commissioner of Housing and Community Renewal (hereinafter referred to as the "Commissioner") shall approve in writing prior to and in connection with the stages of construction as hereinafter defined in Article 2.

(d) Schedule "A" dated June 17, 1965 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as "Schedule 'A'."

(e) Building Loan Agreement hereafter to be entered into by and between the Owner and the New York State Housing Finance Agency (hereinafter referred to as the "Lender").

All the services, materials, costs and expenses included in this Contract (hereinafter referred to as the "Work") comprise the following item of Schedule "A": Item 1, entitled "Construction Costs."

With respect to same, other than items 1f and 1g, the Contractor guarantees payment for said items notwithstanding that the actual cost for said items may exceed the amounts therein set forth.

The Contractor hereby represents that the Test Borings have been made to its full satisfaction.

ARTICLE 2 — Time of Completion

The Work to be performed under this Contract shall be commenced on or before the 1st day of August, 1965, and shall be completed in accordance with the Contract Documents to the satisfaction of the Architect, the Lender and the Commissioner within 60 months thereafter, unless said time be extended in writing by the Owner with the prior written approval of the Commissioner. In no event, however, shall the Work to be performed under this Contract be considered to be completed until all construction items called for in the Contract Documents have been fully completed and all of the conditions of this Contract shall have been fully complied with. It is expressly agreed, however, that in no event shall the Contractor or any Surety be liable for any delay or damage resulting from, or for the construction or repair of, any work damaged or destroyed by any act of God or the public enemy or strikes or by reason of governmental preemption of materials or labor; and the Contractor shall not be liable for any cessation of Work or delay in performance of Work caused by order of the Division, or Commissioner unless such order is issued because of failure of the Contractor to comply with the terms of this Contract.

For the purposes of developing the entire Project, the construction of any part thereof shall be in accordance with such stages as shall be determined by the Owner and Contractor, subject to the written approval of the Commissioner and Lender. The construction shall be performed in such stages and in accordance with the final plans and specifications for each such stage as approved in writing by the Commissioner prior to the commencement of construction for each such stage. Such stages shall be as prescribed and defined in one or more Supplemental Agreements among the parties hereto, substantially in the form attached herewith as Exhibit

BEST COPY AVAILABLE

II, which, upon the execution and approval thereof, shall thenceforth constitute a part of this Contract with the same force and effect as if incorporated herein.

ARTICLE 3 — The Contract Price

The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Two Hundred Fifty-Eight Million Five Hundred Seven Thousand Seven Hundred ($258,507,750 Fifty) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided.

All changes in the Contract Documents must be in writing, signed by the Owner and the Contractor, and shall be conditioned upon the written approval of the Division or Commissioner, which approval may be subject to such conditions and qualifications as the Division or Commissioner in their discretion, may prescribe, it being understood that the Division or Commissioner at all times has the right to require compliance with the original Contract Documents.

ARTICLE 4 — Schedule of Payments

Applications for payments, (hereinafter sometimes referred to as "Requisitions"), under this Contract are to be made by the Contractor to the Owner, in ten copies, in the manner hereinafter provided. The sum to which the Contractor shall be entitled upon any such payment shall be the total of the purchase price of uninstalled materials stored on the mortgaged property or offsite, in a manner acceptable to the Division, plus the cost of the portions of the Work acceptably completed plus a pro rata payment on account of non-auditable allowances included in Schedule "A" and referred to in Article 19 and 20 hereof, less 10% holdback on Items 1 (Construction Costs) of Schedule "A", and less prior advances; except that with respect to that portion of the Work applicable to filling, excavation, piles, foundations and superstructure, the holdback shall be 5%, and less prior advances. Notwithstanding anything to the contrary in this paragraph, with respect to the following portions of the Work, holdback deductions shall not be applicable:

a. With respect to the residential buildings (Item 1.a.1 of Schedule "A")

(1) Water, electricity and other public utility costs (excluding, however, the cost applicable to the Contractor's overhead provided under Article 19 hereof) during construction;

(2) Temporary heat during construction;

(3) Insurance during construction;

(4) Direct labor and watchmen;

(5) Air conditioning units, aluminum windows, refrigerators, ranges, hardware, venetian blinds, medicine cabinets and incinerators, provided, however, that notwithstanding Article 15 hereof, the Contractor's selection of the applicable materialmen shall first be subject to the approval of the Division.

b. With respect to the power plant, including piles (Item 1.a.3 of Schedule "A"):

(1) Boilers, steam turbine generators;

(2) Diesel engines and condensers;

(3) Steam absorption units;

(4) Cooling towers;

(5) Switch gear;

(6) Power house substation;

(7) Apartment buildings substations;

(8) Motor control centers;

(9) Circulating and boiler feed pumps;

(10) Overhead cranes.

c. With respect to the following portions of the work applicable to the entire project:

(1) The mobilization fee of $500,000 for the land fill contract (Item 1.b.2 of Schedule "A");

(2) The Work pursuant to the Agreement with The City of New York (Item 1.c of Schedule "A");

(3) Test borings (Item 1.d of Schedule "A");

(4) Payment and Performance bonds for subcontractors (Item 1.e. of Schedule "A").

At any time after fifty per cent (50%) of the Work required for any stage of construction has been completed, if the Owner and the Commissioner agree, the Owner shall make monthly payments for the Work which may still remain to be done for such stage of construction without making any holdback deduction and for the difference, if any, between the amount of the holdback at the time of such agreement and the amount of holdback applicable when fifty per cent (50%) of the Work for such stage was completed. After the Commissioner has determined that any such stage has been substantially completed, the remaining holdback for such stage may be paid from time to time and in such amounts as the Commissioner shall approve.

The value of any Work included in a Requisition for partial payment which may be unsatisfactory may be deducted from any subsequent Requisition.

In the event that it is necessary for the Contractor, with the approval of the Division, to store any materials offsite, then the Contractor shall be responsible for insurance and warehousing charges, and such charges shall be included in "total cost of the Work" under Article 20 hereof.

Prior to the submission of its first Requisition for a partial payment, the Contractor shall present to the Owner and the Division for approval a trade payment breakdown, in a form as prescribed by the Division, which must contain the amount estimated for each stage of the Work. These amounts, as adjusted to meet the approval of the Owner and the Division, shall not be changed after approval by the Owner and the Division except by written approval of the Commissioner. In the event the progressive audit provided under Article 20 hereof indicates that payments made hereunder exceed the audited cost of the Work as referred to in Article 20, then the Division reserves the right to require revision of the trade payment breakdown or an increase in the holdback, or both, in order to correct such conditions of overpayment. The value employed in making the trade payment breakdown will be used only as a guide for determining the size of the partial payments and to supply statistical information required by the Owner, the Division and the Lender and will not be considered as fixing a basis for additions or deductions from the Contract Price. The trade payment breakdown so prepared shall thereupon become a part of the Contract as if it had been fully set forth herein at the time of the execution of the Contract. Requisitions shall be filed by the Contractor by the 25th day of each month and payment shall be made on or about the 10th day of the following month. The Contractor shall only be entitled to payment in the amount approved by the Owner, the Division and the Lender with respect to said Requisitions.

Upon completion of the Work, the balance due the Contractor hereunder shall be payable to the Contractor by the Owner, in the manner hereinafter provided, with the approval of the Division and the Lender, within thirty (30) days from the date of final completion of this Contract, as determined by the Commissioner; provided, however, that this Contract shall not be considered complete for purposes of final payment unless and until all the Work requiring inspection by municipal or other governmental authorities having jurisdiction has been duly inspected and approved by such authorities and by the applicable Board of Fire Underwriters,

if any, and all requisite certificates of occupancy and other approvals and guarantees have been duly issued and the "total cost of the Work" is determined by audit as set forth in Article 20 and agreed to by the parties hereto and the Commissioner.

ARTICLE 5 — Building Loan

The Contractors understand that the Work herein provided to be done is to be financed by a building loan secured by a mortgage, the terms of which are set forth in the Building Loan Agreement between the Lender and the Owner (plus such sums as may be received by the Owner on the sale of its stock to Cooperator tenants).

ARTICLE 6 — Submissions and Approvals

Anything contained herein to the contrary notwithstanding, whenever any statements, documents or data of any sort, nature or description are required under this Contract to be submitted to the Architect or Owner, or both, duplicates of such statements, documents or data shall be likewise submitted to the Division and the Lender if requested by them, or either of them, or by their duly constituted representatives. Whenever it is provided in this Contract that the approval of, a certificate or order from, the Architect shall be received either as a condition precedent to any action being taken or not taken, as the case may be, or as a prerequisite to the exercise by the parties hereto of any right or rights hereunder, including the right to receive payment under this contract, the Division or the Lender may require that such approval and such certificate or order shall, before being effective, be accompanied by the written approval of the Division and the Lender.

ARTICLE 7 — Mechanics' Liens

If ... mechanics' liens or other claim or claims shall be filed or maintained against the buildings, improvements or real estate appurtenant thereto, for or on account of any Work under this Contract in furtherance of the erection, construction and completion of the Work contracted for herein, then it shall be the obligation of the Contractor to make provision satisfactory to the Division and Lender for the satisfaction of such liens or claims.

ARTICLE 8 — Receipts and Releases of Lien

The Owner or the Division may require the Contractor to obtain and attach to each requisition acknowledgments of payments down to the date covered by the last advance from all subcontractors and materialmen dealing directly with the Contractor. In any event, the Contractor shall furnish an affidavit that all subcontractors and materialmen have been paid down to the date covered by such last advance. Concurrently with any final payment for any stage of construction, the Contractor shall submit, in duplicate, an affidavit certifying that there are no liens, claims or demands by subcontractors, materialmen, laborers, other employees or third persons applicable to such stage of construction. General releases and releases of all claims based upon which a mechanic's lien may be asserted by the Contractor or any subcontractor shall be furnished to the Owner and shall cover all work, labor and materials including equipment and fixtures of all kinds performed for or furnished to the Owner, the Contractor, subcontractors and materialmen.

ARTICLE 9 — Assignability of Contract

The Contractor shall not assign this Contract or any amount payable hereunder without the prior written consent of the Commissioner and the Lender. The Contractor, upon request, shall disclose to the Division and to the Lender the names of all persons with whom it has contracted

or intends to contract or hereafter contracts with respect to the Work hereunder. The Owner may assign this Contract or any rights arising hereunder, including any guarantees or warranties of workmanship or material, to the Division or the Lender.

ARTICLE 10 — Employment Practices

(a) *Prevailing Wages*

The Contractor and each Subcontractor agree to pay prevailing wages; and in order to enable the Contractor to determine whether such wages are being paid by the Subcontractor, each subcontract shall provide that the Contractor and the Division shall have the right to inspect the Subcontractor's books, payrolls and accounts with respect to the subcontract from time to time for the purpose of verifying whether prevailing wages are being paid by the Subcontractor. The union scale of wages paid in the locality for the work of such laborers and mechanics so employed shall be accepted by the parties hereto as the prevailing wages for such work.

Upon failure of the Contractor or any Subcontractor to comply fully with the provision of this Section, the Owner may, in his own discretion, or shall, at the direction of the Commissioner, withhold from the Contractor hereunder any payments or advances payable to the Contractor hereunder until the Contractor establishes to the satisfaction of the Division that all laborers and mechanics or other persons employed in the Construction of the Project have been paid prevailing wages as hereinabove referred to.

(b) *Non-Discrimination Clauses*

During the performance of this Contract, the Contractor agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and will take affirmative action to insure that they are afforded equal employment opportunities without discrimination because of race, creed, color or national origin. Such action shall be taken with reference, but not limited, to: recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.

(2) The Contractor will send to each labor union or representative of workers with which it has or is bound by a collective bargaining or other agreement or understanding, a notice, to be provided by the State Commission for Human Rights advising such labor union or representative of the Contractor's agreement under clauses (1) through (8) (hereinafter called "nondiscrimination clauses"). If the Contractor was directed to do so by the Commissioner as part of the bid or negotiation of this Contract, the Contractor shall request such labor union or representative to furnish it with a written statement that such labor union or representative will not discriminate because of race, creed, color or national origin, and that such labor union or representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these nondiscrimination clauses or that it consents and agrees that recruitment, employment and the terms and conditions of employment under this Contract shall be in accordance with the purposes and provisions of these nondiscrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the Contractor shall promptly notify the State Commission for Human Rights of such failure or refusal.

(3) The Contractor will post and keep posted in conspicuous places, available to employees and applicants for employment, notices to be provided by the State Commission for Human Rights setting forth the substance of the provisions of clauses (1) and (2) and such provisions of the State's laws against discrimination as the State Commission for Human Rights shall determine.

(4) The Contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color or national origin.

(5) The Contractor will comply with the provisions of Section 291-299 of the Executive Law and the Civil Rights Law, will furnish all information and reports deemed necessary by the State Commission for Human Rights under these nondiscrimination clauses and such sections of the Executive Law, and will permit access to their books, records and accounts by the State Commission for Human Rights, the Attorney General and the Commissioner for purposes of investigation to ascertain compliance with these nondiscrimination clauses and such sections of the Executive Law and Civil Rights Law.

(6) This Contract may be forthwith canceled, terminated or suspended, in whole or in part, by the Commissioner upon the basis of a finding made by the State Commission for Human Rights that the Contractor has not complied with these nondiscrimination clauses and the Contractor may be declared ineligible for future contracts made by or on behalf of the State or a public authority or agency of the State, or contracts requiring the approval of the Commissioner until they have satisfied the State Commission for Human Rights that they have established and are carrying out a program in conformity with the provisions of these nondiscrimination clauses. Such findings shall be made by the State Commission for Human Rights after conciliation efforts by the State Commission for Human Rights have failed to achieve compliance with these nondiscrimination clauses and after a verified complaint has been filed with the State Commission for Human Rights, notice thereof has been given to the Contractor and an opportunity has been afforded it to be heard publicly before three (3) members of the State Commission for Human Rights. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

(7) If this Contract is canceled or terminated under Clause (6), in addition to other rights of the Owner, Commissioner or Lender provided in this contract upon its breach by the Contractor, the Contractor will hold the Owner and the Lender harmless against any additional expenses or costs incurred by the Owner and/or the Lender in completing the Work or in purchasing the services, materials, equipment or supplies contemplated by this Contract, and the Owner and/or the Lender, at the direction of the Commissioner, shall withhold payments from the Contractor in an amount sufficient for this purpose and recourse may be had against the surety on the performance bond if necessary.

(8) The Contractor will include the provisions of clauses (1) through (7) in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to operations to be performed within the State of New York. The Contractor will take such action in enforcing such provisions of such subcontract or purchase order as the Commissioner may direct, including sanctions or remedies for non-compliance. If the Contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the Commissioner, the Contractor shall promptly so notify the Attorney General, requesting him to intervene and protect the interests of the State of New York and the Lender.

ARTICLE 11 — Permits and Surveys

Notwithstanding any other provisions of the Contract Documents which form a part hereof, the Contractor shall furnish and pay for all permits and surveys including but not limited to, licenses, tools, equipment, utilities and temporary structures necessary for the construction of the Project as required.

The Contractor shall also furnish to the Owner and the Title Insurance Company or Companies insuring the interests of the Lender, with five copies to the Division, a survey showing the location on the site of the improvements existing thereon. Such survey shall be brought up to date with each Requisition in accordance with such requirements as the Lender or the Commissioner may from time to time direct. The minimum standards for all surveys shall be as set

forth in Exhibit III attached hereto. All surveys shall be certified to the Lender, the Commissioner and the aforesaid title companies and must bear the name, address and signature of the licensed surveyor who made such survey, his metal seal or license number, and the date of such survey. The survey accompanying the requisition for final payment must show the exact location of all improvements, utilities including water, sewers, gas and electric services and of all easements for such utilities then existing. The licensed surveyor preparing such survey shall certify that the Project is installed and erected entirely upon the site secured by the mortgage referred to in Article 3 hereof, and within the building restriction lines, if any, on said site, and does not overhang or encroach upon any easement or right-of-way of others except as permitted by franchise or permission of the City of New York or any other governmental authority. Any deviation from the Contract Documents with respect to the location on the site of the improvements shall be the sole responsibility of the Contractor and the cost of repair shall not be chargeable as part of the "total cost of the Work" defined in Article 20 hereof.

The Contractor shall furnish the Owner, the Lender and the Division, upon demand of the Division, quantity surveys, made by an independent outside agency, of all material required in connection with this Contract.

The cost of all such permits, surveys, and such other items referred to in this Article, in amounts approved by the Division, shall be included in the "total cost of the Work" under Article 20 hereof.

ARTICLE 12 — Change Orders and Proceed Orders

The Contractor shall not be required to perform any additional or extra work ordered by the Owner and/or the Division unless a change order or proceed order for such extra work shall be first agreed upon between the Owner and the Contractor and approved by the Division in writing. Only on each change order for extra work which increases the Contract Price, the Contractor shall be allowed an amount equal to [illegible] per cent (1.5%) of the amount of such change order as Contractor's profit and overhead. With respect to work deleted by means of a credit change order, no deduction shall be made in the amount set forth in Article 20 hereof.

ARTICLE 13 — Insurance

Anything to the contrary contained in the General Conditions notwithstanding, the Contractor agrees that the following insurance shall be obtained and paid for by it and be in effect at such time as the Division directs:

1. Builder's Risk Fire Insurance With Extended Coverage on a completed value basis for full insurable value covering the interest of the Owner and the Contractor (and containing a waiver of subrogation against the Contractor's subcontractors or subsubcontractors) upon all work incorporated in the structures and all materials and equipment, on or about the premises intended for permanent use in the structures or incident to the construction thereof, the cost of which is included in the Work hereunder, but not including the machinery, tools or equipment used by the Contractor, its subcontractors and subcontractors in the performance of the Work.

2. Broad Form Comprehensive General Liability Insurance covering the Contractor with limits of $500,000/$1,000,000 for bodily injury plus $500,000/$1,000,000 property damage.

3. Workmen's Compensation and Employer's Liability Insurance covering the Contractor.

4. Owner's Protective Liability Insurance covering the Owner with limits of $500,000/$3,000,000 for bodily injury plus $500,000/$1,000,000 property damage.

The policies of such insurance shall be in such form and with such companies as shall be approved by the Owner, the Division and the Lender and copies of all insurance policies shall be delivered to the Owner and the Division prior to the aforesaid effective date. The cost of such insurance shall be included in the "total cost of the work" as defined in Article 20 hereof.

The Contractor further agrees to indemnify and save harmless the Owner, the State of New York, and the Lender, against loss or expense by reason of the liability imposed by law upon the Contractor, the Owner, the State of New York and the Lender, for damages because of bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons or on account of damage to property arising out of or in consequence of the performance of this Contract, whether such injuries to persons or damage to property are due or claimed to be due to any negligence of the Contractor, his or their employees or agents, or any other person.

ARTICLE 14 — Execution of Instruments

The Owner shall, in writing, designate an officer or officers of Owner as its representative with full authority to execute any and all instruments requiring the signature of the Owner and to act in behalf of the Owner with respect to all matters arising out of this Contract.

The Owner will execute all bonds, notes, mortgages, agreements, certificates, affidavits, applications and other instruments which may be required by the Division and/or the Lender and/or utility companies, in connection with or necessary for the closing transaction with the Lender and the performance of this Contract by the Contractor, and will execute applications and such other instruments as the Division and/or the Lender may require for advances under the Building Loan Agreement and Mortgage, until full and final payment to the Contractor of all sums due it under this Contract, and the discharge from all obligations under the Contract or Payment and Performance Bonds to be furnished hereunder.

If any such agreement or instrument so to be executed by the Owner shall require the approval of the Commissioner as a prerequisite to its legality or if any such agreement or instrument shall not be binding upon or enforceable against the Owner unless and until approved by the Commissioner then and in such event, the Owner shall deliver to the Contractor, at the time that each such agreement or instrument shall be executed by the Owner, the written approval and consent of the Commissioner to the execution of such agreement by the Owner. Whenever the approval of the Commissioner is required under the terms of this Contract, such approval may be given by his duly authorized representative employed by the Division.

ARTICLE 15 — Subcontracts

The Contractor shall be the sole judge as to the selection of subcontractors and materialmen and of the amounts to be paid to them for work performed and material furnished, and may revise, amend, modify or cancel any contract or agreement made with any subcontractor or materialmen as, in the discretion of the Contractor, may be necessary or advisable but such revision, amendment, modification or cancellation shall not add to the "total cost of the Work" as defined in Article 20 hereof, if disapproved in writing by the Division, within thirty (30) days after submission in writing to the Division and to the Owner by the Contractor. The Contractor shall maintain in its files all proposals received by it from subcontractors and materialmen including detailed proposals covering any change order issued as a result of a revision, amendment, or modification. In addition to the foregoing, the Contractor shall supply the Division with two (2) copies of all subcontracts to be delivered promptly after execution, plus two (2) copies of all revisions, amendments or modifications issued by the Contractor to any subcontractor. No payment shall be made on account of work performed by a subcontractor under a subcontract unless there shall have been filed with the Division, prior to the submission of a requisition for each payment, two (2) copies of such subcontract containing the provisions required by this Contract to be contained therein.

The Contractor agrees to include a provision in all subcontracts that in order to enable the Commissioner to verify the Contractor's costs, the Commissioner reserves the right to have his representatives obtain access during working hours to the books of account and records of the Subcontractors relating to the Work under this Contract, including the right to make excerpts from such books and records.

Notwithstanding the provisions of this Article 15, if the Contractors or any officer or director of the Contractor, or any stockholder holding ten per cent (10%) or more of the voting stock of the Contractors, or any person having directly or indirectly an interest of ten per cent (10%) or more in the Contractor, also is a subcontractor or materialman, or is an officer or director of a subcontractor or materialman, or stockholder holding ten per cent (10%) or more of the voting stock of the subcontractor or materialman, or any person having directly or indirectly an interest of ten per cent (10%) or more in the subcontractor or materialman, then the Contractor shall certify, prior to receiving any final payment hereunder that the amount paid to such subcontractor or materialman was a fair and reasonable price for the work and/or materials furnished by such subcontractor or materialman. Only such fair and reasonable price shall be considered in determining the "total cost of the Work" pursuant to Article 20 hereof.

ARTICLE 16 — Completion and Final Payment Under Building Loan

If all the Work required under said Contract Documents shall have been substantially completed as determined by the Commissioner, the Owner will, at the request of the Division, provided the Lender shall concur therein, establish an escrow fund in such amount and subject to such conditions as the Division may require, to cover the cost of completion of such Work in order to expedite payment of the final advance under the Building Loan Agreement.

ARTICLE 17 — Payment and Performance Bonds

The Contractor shall cause to be furnished to the Owner and the Lender five copies of the executed Payment and Performance Bonds required pursuant to Article 1, subparagraph (e) therein, and any Supplemental Agreement referred to in Article 2 hereof, to secure the faithful performance of the applicable Work and as security for the payment of all subcontractors and materialmen performing labor or furnishing materials in connection with the applicable Work, prepared on the forms of Bonds attached herewith as Exhibit I, and having such surety or surety companies thereunder as are approved by the Lender and the Division.

ARTICLE 18 — Payment of Building Loan Advances to Contractors

The Owner agrees to pay over to the Contractor all payments on account of all items covered by this Contract, provided it is entitled to receive them, promptly upon the receipt thereof from the Lender, and such payments shall be received by the Contractor on account of the Contract Price. A representative of the Owner, who shall have authority to execute receipts, endorsements and other instruments on behalf of the Owner, shall attend at all payments to be made by the Lender, if requested by the Lender. The Owner shall give the Contractor prior notice of the time and place of each such payment.

ARTICLE 19 — Non-Auditable Allowances

The sum of $2,000,000 , included in the above specified Contract Price, shall compensate the Contractor for the following items: Contractor's home office overhead in connection with the construction items of the Project; miscellaneous traveling and expediting costs; bookkeeping expenses; the Contractor's legal and accounting expenses.

ARTICLE 20 — Audits and Determination of Savings Under Contract

Within twenty (20) days after completion of the Project, but prior to the final payment for all the Work required hereunder, the Contractor shall deliver to the Owner and to the Division, an audit prepared by the Contractor's Certified Public Accountant, certifying the total costs, charges and expenses heretofore and hereafter paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract within the scope of Article 2, but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in Article 19 hereof with

BEST COPY AVAILABLE

respect to which no audit shall be made or delivered. To the total costs, charges and expenses incurred by the Contractor and/or the Owner in connection with this Contract, including change orders but exclusive of all sums paid and, or incurred by the Contractor for the items set forth in Article 19 hereof there shall be added the sum of $. 2,000,000 ..., to cover the costs and expenses set forth in Article 19 hereof, whether such costs and expenses be more or less than the said sum $. 2,000,000 ... The total of the foregoing sums are hereafter in this article referred to as "total cost of the Work." If the total of the original Contract Price provided in this Contract, and the debit and credit change orders as agreed to by the parties hereto and approved by the Commissioner shall be greater than the "total cost of Work," the amount by which it exceeds the "total cost of the Work" shall be considered a saving. The Owner shall be entitled to such saving provided, however, that any surety shall not be liable for the return of such saving.

Change orders issued by the Owner to the Contractor pursuant to the terms of this Contract for extra work or to delete work shall indicate on the face thereof the amount, if any, by which the Contract Price shall be adjusted thereby and the amounts or maximum amounts which shall be included in or recognized as costs, charges or expenses, to the extent paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract, or by which the applicable subcontracts shall be adjusted.

Any New York City Gross Receipts Tax that may be assessed, levied or imposed upon the Contractor in connection with the payments to be made hereunder by the Owner to the Contractor shall constitute a charge, cost and expense to be included in the "total cost of the Work" under this Article 20.

The Division and the Owner shall each have the right to make its own independent audit of the Contractor's costs progressively during the course of the Work and upon completion of the Work.

The audit by the Division to determine the Contractor's costs and savings hereunder shall be binding and conclusive upon the parties hereto unless within thirty (30) days after the delivery thereof, the Contractor or Owner shall notify the Division in writing that the determinations made in said audit are not acceptable. In such event and within a period of thirty (30) days after such delivery, the Owner or the Contractor may, each at its own expense, cause an audit to be made by an accountant of its own choice certifying the total costs, charges and expenses heretofore and hereafter paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract, but exclusive of all sums paid and/or incurred by the Contractors for the items set forth in Article 19, hereof, with respect to which no audit shall be made, and if, within ten (10) days after the completion and delivery thereof, the parties hereto are unable to agree upon the amount of such savings, if any, the items in dispute including any deposit which arose out of the Work included in this Contract, shall be submitted to arbitration in accordance with the rules of the American Arbitration Association. In the event the Owner and/or the Contractor fails to make and deliver an audit, then any matters may proceed to arbitration as hereinbefore provided. The Owner may adopt the audit of the Division as its own for the purpose of such arbitration. The decision pursuant to any arbitration shall be binding upon the parties hereto, if accepted by the Commissioner, who does not intend to surrender any of his powers and duties under the Private Housing Finance Law notwithstanding any provision in any of the Contract Documents to the contrary. The cost of such arbitration shall be borne equally by the Owner and the Contractor. Such audit and/or arbitration expenses incurred by the Contractor shall not be subject to reimbursement.

The Contractor agrees that the representatives of the Division shall have full and free access without delay, during working hours, to all books of account and records of the Contractor relating to the Work under this Contract, including the right to make photostatic copies of or excerpts or transcripts from such books of account and records and related and supporting documents and statements, including but not limited to bank statements, checks paid by banks and check book stubs. The Contractor agrees to maintain said books and records at 461 Grand ... Street, New York, New York .....

Facilities for the Auditor shall be provided including a desk, chair, adding machine, and telephone at the home offices of the Contractor and the Owner.

Separate bank accounts as prescribed by the Division or Lender and Books of account and records shall be maintained by the Contractor in connection with this Contract. Entries shall not be made therein with respect to any other job of the Contractors. The separate books of account shall include, but need not be limited to: General Ledger, Cash Receipts Book, Cash Disbursements, Voucher Register, Payroll Register, Insurance Register and Contractor's Ledger. All disbursements under this Contract shall be made by check from the separate bank account or accounts established by the Contractor. No deposits therein or withdrawals therefrom shall be made by the Contractor with respect to any other construction job. The Contractor shall use the Uniform System of Accounts prescribed by the Division in the accounting required for this Contract.

For the purpose of determining savings, if any, the "total cost of the Work" shall be determined by the Division without regard to the overrun or nonerrun on any specific item set forth in Schedule "A" and included in this Contract provided that nothing herein contained shall be deemed to limit the right of the Division to determine whether or not any item of actual cost is properly includible in the "total cost of the Work."

ARTICLE 21 — Contract Under Private Housing Finance Law

The Contractor understands and recognizes that the Owner is a limited-profit housing company and that the Owner and this Contract are subject to the provisions of the Private Housing Finance Law and the rules, regulations and supervision of the Commissioner. It is further agreed that this Contract shall not become effective prior to approval thereof by the Commissioner.

ARTICLE 22 — Sole Agreement of Parties Contained in This Contract

It is agreed and understood that all understandings and agreements heretofore had between the parties hereto are merged in this Contract which fully and completely expresses their agreement. This Contract shall not be modified or amended except by written agreement, between the parties, approved by the Commissioner.

ARTICLE 23 — Captions

The captions used for the Articles in this Contract are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of the intent of this Contract, or any Article thereof.

In Witness Whereof, the parties hereto have executed this Contract as of the day and year first above set forth.

Contractor:

(seal)

By: .....
Vice-President

Owner:

(seal)

By: .....
President

Approved this 15th day

of ....., 1965

.....
Commissioner of Housing and
Community Renewal of The
State of New York

EXHIBIT "4" - CONSTRUCTION CONTRACT, DATED JUNE 18, 1965 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this 18... day of ...June....., 1965 before me personally came ..HAROLD OSTROFF....., to me known, who being by me duly sworn did depose and say that he resides at 3915 Orloff.. Avenue, Bronx, New York .....

that he is the .Vice ..... President of COMMUNITY SERVICES, INC. ....., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

Walter Berger
Notary Public

WATTIE BERGER
Notary Public, State of New York
No. 24-5205615
Qualified in Bronx County
Commission Expires March 30, 1966

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this 18... day of ...June....., 1965 before me personally came .ABRAHAM E. KAZAN....., to me known, who being by me duly sworn did depose and say that he resides at ..130 Gale.... Place, Bronx, New York .....

that he is the ..... President of RIVERBAY CORPORATION ....., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

Walter Berger
Notary Public

WATTIE BERGER
Notary Public, State of New York
No. 24-5205615
Qualified in Bronx County
Commission Expires March 30, 1966

SCHEDULE A

Date: June 18, 1965

Name of Project: RIVERBAY CORP. (CO-OP CITY) (X) Cooperative

Address of Project: BRONX, NEW YORK ( ) Rental

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

		(1)	(2)	(3)	(4)
1. CONSTRUCTION COSTS					
a. 1. Residential Structures		$183,120,000			
2. Commercial Structures & Community Spaces		$ 7,750,000			
3. Garages (Including Piles)		$ 17,000,000			
4. Site Work & Landscaping		$ 4,500,000			
5. Steam Room Power Plant Incl. Piles		$ 26,000,000			
b. 1. Abnormal Foundations Piles (Res. & Gar.)		$ 7,500,000			
2. Other abnormal features Fill		$ 6,100,000			
c. Completion Costs City Site Work		$ 2,000,000			
d. Test Borings		$ 300,000			
e. Premium on Bonds		$ 700,000	$256,507,750		
f. Contractor's Home Office Overhead	-.78%	$ 2,000,000			
g. Contractor's Fee	- 01	$ 0	$ 2,000,000	$258,207,750	$ 3,247
2. PROFESSIONAL SERVICES					
a. Architect's Fees		$ 2,350,000			
b. Legal Fees		$ 150,000			
c. Preliminary Surveys and Title Search		$ 400,000			
d. Professional Engineer's & Laboratory Fees Incl. Fill Placement & Compaction Insp. Eng.		$ 750,000	$ 3,650,000		$ 50
3. SELLING OR RENTING EXPENSES					
a. Selling Expenses		$ 450,000			
b. Renting Expenses		$ 0	$ 450,000		$ 6
4. CARRYING AND FINANCING CHARGES					
a. Interest @ % for months		$ 6,250,000			
b. Taxes @ % for months on A.V. of		$ 2,500,000			
c. H.C. Administrative Expenses		$ 200,000			
d. Supervising Governmental Agency Fee	1.0%	$ 2,500,000			
e. Financing Expenses	0.2%	$ 500,000			
f. Title and Recordation Expense		$ 340,000	$ 12,300,000	$	169
g. Estimated net effect of Operations Non-Construction Items - $		$(10,000,000)			(137)
h. Contractor's Profit on Non-Construction Items - $		$ 0	$(10,000,000)	$ 6,400,000	$ 0
5. TOTAL			170,250	$264,000,550	$3,435
6. COST OF LAND ACQUISITION			$ 15,561,382		$ 220
a. Carrying Charges & Expenses			$ 581,858	$ 16,113,440	$ 220
7. ESTIMATED TOTAL DEVELOPMENT COST			(200,000)	$281,022,000	$3,655
8. CONTINGENCY - 0.7 % of Item #7			$ 2,000,000		$ 0
9. WORKING CAPITAL -0.24 % of Item #7			$ 673,550	2,673,550	$ 37
10. ESTIMATED TOTAL CAPITAL REQUIREMENTS				$283,695,550	$3,693
11. MORTGAGE LOAN - 88.6% of Item #10				$250,000,000	$3,443
12. EQUITY REQUIREMENTS				$ 32,799,550	$ 450
a. 1. No. of Shares of Common Capital Stock					
2. Par Value - $			$ 0		
b. Income Debentures, (Interest %)			$ 0		
c. Total Equity Capital				$ 0	

No. of D.U.'s 15,500 — No. of Rental Rooms 72,879

Cost Per D.U. $18,130 — Cost Per Rental Room 3,856

HUD-(FH-2.24 (1/64)

Surplus From Pre-Occupancy Operations

(SCHEDULE A)

BEST COPY AVAILABLE

EXHIBIT "4" - CONSTRUCTION CONTRACT, DATED JUNE 18, 1965 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

(SCHEDULE A)

EXHIBIT "5" - MODIFICATION NO. I OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER I

OF

CONSTRUCTION CONTRACT

THIS CONTRACT made as of the 14th day of April, 1967 by and between RIVERBAY CORPORATION (hereinafter referred to as the "Owner"), a domestic corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC. (hereinafter referred to as the "Contractor"), a domestic corporation authorized to do business in the State of New York, having an office at 456 Grand Street, New York, New York,

W I T N E S S E T H :

WHEREAS, the Owner and the Contractor entered into a Construction Contract dated as of June 18, 1965, relating to work to be performed by the Contractor in connection with the construction of the Co-op City Project, in the Borough of The Bronx, City of New York (which Construction Contract is hereinafter referred to as the "Construction Contract"); and

WHEREAS, there has been an increase in the cost of the construction of said Project, and a resulting increase in the Building Loan, as reflected in Modification Number One of Building Loan Agreement of even date herewith relating to said

Project; and

WHEREAS, the parties hereto have agreed to amend the Construction Contract to reflect such changes.

NOW, THEREFORE, it is agreed as follows:

1. Subparagraphs (d) and (e) of ARTICLE 1 of the Construction Contract are hereby deleted, and the following subparagraphs (d) and (e) are hereby substituted therefor:

"(d) Schedule 'A' dated March 13, 1967 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as 'Schedule 'A'.

"(e) Building Loan Agreement dated July 15, 1965 entered into by and between the Owner and the New York State Housing Finance Agency (hereinafter referred to as the 'Lender'), as amended by Modification Number One of Building Loan Agreement dated April 17, 1967 between the Lender and the Owner."

2. The first paragraph of ARTICLE 3 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Two Hundred Sixty-Seven Million Eight Hundred Thirty Thousand Seven Hundred Fifty ($267,830,750) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided."

3. The first paragraph of ARTICLE 4 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"Applications for payments, (hereinafter sometimes referred to as "Requisitions"), under this Contract are to be made by the Contractor to the Owner, in ten copies, in the manner hereinafter provided. The sum to which the Contractor shall be entitled upon any such payment shall be the total of the purchase price of un-installed materials stored on the mortgaged property or offsite, in a manner acceptable to the Division, plus the cost of the portions of the Work acceptably completed plus a pro rata payment on account of non-auditable allowances included in Schedule 'A' and referred to in Articles 19 and 20 hereof, less 10% holdback on Item 2 (Construction Costs) of Schedule 'A', and less prior advances; except that with respect to that portion of the Work applicable to filling, excavation, piles, foundations and superstructure, the holdback shall be 5%, and less prior advances. Notwithstanding anything to the contrary in this paragraph, with respect to the following portions of the Work, holdback deductions shall not be applicable:

a. With respect to the residential buildings (Item 2.c. of Schedule 'A')

(1) Water, electricity and other public utility costs (excluding, however, the cost applicable to the Contractor's overhead provided under Article 19 hereof) during construction;

(2) Temporary heat during construction;

(3) Insurance during construction;

(4) Direct labor and watchmen;

(5) Air conditioning units, aluminum windows, refrigerators, ranges, hardware, venetian blinds, medicine cabinets and incinerators, provided, however, that notwithstanding Article 15 hereof, the Contractor's selection of the applicable materialmen shall first be subject to the approval of the Division.

b. With respect to the power plant (Item 2.f. of Schedule 'A'):

(1) Boilers, steam turbine generators;

(2) Diesel engines and condensers;

(3) Steam absorption units;

(4) Cooling towers;

(5) Switch gear;

(6) Power house substation;

(7) Apartment buildings substations;

(8) Motor control centers;

(9) Circulating and boiler feed pumps;

(10) Overhead cranes.

c. With respect to the following portions of the work applicable to the entire project:

(1) The mobilization fee of $500,000 for the land fill contract (Item 2.a. of Schedule 'A');

(2) The work pursuant to the agreement with The City of New York (Item 2.h. of Schedule 'A');

(3) Payment and Performance bonds for sub-contractors (Item 2.i. of Schedule 'A')."

4. ARTICLE 5 of the Construction Contract is hereby deleted and the following ARTICLE 5 is hereby substituted therefor:

"ARTICLE 5 - Building Loan

The Contractor understands that the Work herein provided to be done is to be financed by a building loan secured by mortgages, the terms of which are set forth in the Building Loan Agreement dated July 15, 1965 between the Lender and the Owner, as amended by Modification Number One of Building Loan Agreement dated April 14, 1967 between the Lender and the Owner (plus such sums as may be received by the Owner on the sale of its stock to cooperator tenants)."

5. Schedule "A" dated as of March 13, 1967, annexed hereto, shall be and the same hereby is substituted for the Schedule "A" heretofore annexed to the contract.

6. Except as hereby amended, the Construction Contract remains in full force and effect and, in the event of any incon-

sistency between the Construction Contract and this Modification Number I of Construction Contract, the provisions of the latter shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

RIVERBAY CORPORATION

By _____
President

ATTEST:

_____
Assistant Secretary

COMMUNITY SERVICES, INC.

By _____
Vice President

ATTEST:

_____
Secretary

APPROVED THIS 21st DAY OF April, 1967

JAMES Wm. GAYNOR

Commissioner of Housing and Community Renewal of the State of New York.

By _____
Deputy Commissioner of Housing and Community Renewal of the State of New York

EXHIBIT "5" - MODIFICATION NO. I OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of APRIL, 1967, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

ROY CARROLL
Notary Public, State of New York
No. 24-1557440
Qualified in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of APRIL, 1967, before me personally came PAUL KRAMER, to me known, who being by me duly sworn, did depose and say that he resides at No. 246 East 238th Street, Bronx, New York; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

ROY CARROLL
Notary Public, State of New York
No. 24-1557440
Qualified in New York County
Commission Expires March 30, 1969

EXHIBIT "6" - MODIFICATION NO. II OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER II

OF

CONSTRUCTION CONTRACT

THIS CONTRACT made as of the 22nd day of January, 1968 by and between RIVERBAY CORPORATION (hereinafter referred to as the "Owner"), a domestic corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC. (hereinafter referred to as the "Contractor"), a domestic corporation authorized to do business in the State of New York, having an office at 465 Grand Street, New York, New York,

W I T N E S S E T H :

WHEREAS, the Owner and the Contractor entered into a Construction Contract dated as of June 15, 1965 as amended by Modification Number One dated as of April 14, 1967 relating to work to be performed by the Contractor in connection with the construction of the Co-op City Project, in the Borough of The Bronx, City of New York (which Construction Contract is hereinafter referred to as the "Construction Contract"); and

WHEREAS, the Contractor, by letter dated as of January 22, 1968, has requested an increase in the allowance for Contractor's Overhead; and

WHEREAS, the parties hereto have agreed to amend the Construction Contract to reflect such change.

NOW, THEREFORE, it is agreed as follows:

1. Subparagraph (d) of ARTICLE 1 of the Construction Contract is hereby deleted, and the following subparagraph (d) is hereby substituted therefor:

> "(d) Schedule 'A' dated January 22, 1968 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as 'Schedule 'A'."

2. The first paragraph of ARTICLE 3 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

> "The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Two Hundred Sixty-Eight Million Eighty Thousand Seven Hundred Fifty ($268,080,750.) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided."

3. Schedule "A" dated as of January 22, 1968, annexed hereto, shall be and the same hereby is substituted for the Schedule "A" heretofore annexed to the contract.

4. Article 19 of the Construction Contract is hereby deleted and the following Article 19 is hereby substituted therefor:

"ARTICLE 19 - Non-Auditable Allowances

> The sum of $2,250,000, included in the above specified Contract Price, shall compensate the Contractor for the following items: Contractor's home office overhead in connection with the construction items of the Project; miscellaneous traveling and expediting costs; bookkeeping expenses; the Contractor's legal and accounting expenses."

5. The first paragraph of Article 20 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"ARTICLE 20 - Audits and Determination of Savings Under Contract

> Within twenty (20) days after completion of the Project, but prior to the final payment for all the Work required hereunder, the Contractor shall deliver to the Owner and to the Division an audit prepared by the Contractor's Certified Public Accountant,

> certifying the total costs, charges and expenses heretofore and hereafter paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract within the scope of Article 1, but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in Article 19 hereof with respect to which no audit shall be made or delivered. To the total costs, charges and expenses incurred by the Contractor and/or the Owner in connection with this Contract, including change orders but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in Article 19 hereof there shall be added the sum of $2,250,000., to cover the costs and expenses set forth in Article 19 hereof, whether such costs and expenses be more or less than the said sum $2,250,000. The total of the foregoing sums are hereafter in this article referred to as "total cost of the Work." If the total of the original Contract Price provided in this Contract, and the debit and credit change orders as agreed to by the parties hereto and approved by the Commissioner shall be greater than the "total cost of Work," the amount by which it exceeds the "total cost of the Work" shall be considered a saving. The Owner shall be entitled to such saving provided, however, that any surety shall not be liable for the return of such saving."

6. Except as hereby amended, the Construction Contract remains in full force and effect and, in the event of any inconsistency between the Construction Contract and this Modification Number II of Construction Contract, the provisions of the latter shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

RIVERBAY CORPORATION

By _____
President

ATTEST:

_____
Vice President

COMMUNITY SERVICES, INC.

By _____
Vice President

ATTEST:

_____
Vice President

APPROVED THIS 8th DAY OF February, 1968

_____
Commissioner of Housing and Community Renewal
of the State of New York.

BEST COPY AVAILABLE

EXHIBIT "6" - MODIFICATION NO. II OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 22nd day of January, 1968, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

HARVEY C. SIGELBAUM
Notary Public, State of New York
No. 31 [illegible]
Qualified In New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 22nd day of January, 1968, before me personally came PAUL KRAMER, to me known, who being by me duly sworn, did depose and say that he resides at No. 246 East 238th Street, Bronx 70, New York----------; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

HARVEY C. SIGELBAUM
Notary Public, State of New York
No. 31-4028850
Qualified In New York County
Commission Expires March 30, 1969

EXHIBIT "7" - MODIFICATION NO. III OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER III

OF

CONSTRUCTION CONTRACT

HCLP #51
5xB

THIS CONTRACT made as of the 29th day of March, 1968 by and between RIVERBAY CORPORATION (hereinafter referred to as the "Owner"), a domestic corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC. (hereinafter referred to as the "Contractor"), a domestic corporation authorized to do business in the State of New York, having an office at 465 Grand Street, New York, New York.

W I T N E S S E T H:

WHEREAS, the Owner and the Contractor entered into a Construction Contract dated as of June 18, 1965 as amended by Modification Number One dated as of April 14, 1967 and Modification Number Two dated as of January 22, 1968 relating to work to be performed by the Contractor in connection with the construction of the Co-op City Project, in the Borough of The Bronx, City of New York (which Construction Contract is hereinafter referred to as the "Construction Contract"); and

WHEREAS, there has been an increase in the cost of construction of said Project, as reflected in Item 2.d. of Schedule A attached hereto; and

WHEREAS, the parties hereto have agreed to amend the Construction Contract to reflect such change.

NOW, THEREFORE, it is agreed as follows:

1. Subparagraph (d) of ARTICLE 1 of the Construction Contract is hereby deleted, and the following subparagraph (d) is hereby substituted therefor:

"(d) Schedule 'A' dated March 29, 1968 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as 'Schedule 'A'."

2. The first paragraph of ARTICLE 3 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Two Hundred Sixty-Nine Million Nine Hundred Eighty Thousand Seven Hundred Fifty ($269,980,750.) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided."

3. Schedule "A" dated as of March 29, 1968, annexed hereto, shall be and the same hereby is substituted for the Schedule "A" heretofore annexed to the contract.

4. Except as hereby amended, the Construction Contract remains in full force and effect and, in the event of any inconsistency between the Construction Contract and this Modification Number Three of Construction Contract, the provisions of the latter shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

RIVERBAY CORPORATION

By _____
President

ATTEST:

_____
Vice President

COMMUNITY SERVICES, INC.

By _____
Vice President

ATTEST:

_____
Vice President

APPROVED THIS 1st DAY OF April 1968

_____
Commissioner of Housing and Community Renewal
of the State of New York.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 29th day of March, 1968, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

JANE T. FELDMAN
Notary Public, State of New York
No. 31-1126000
Qualified in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 29th day of March, 1968, before me personally came PAUL KRAMER, to me known, who being by me duly sworn, did depose and say that he resides at 246 East 238th Street, Bronx 70, New York; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

EXHIBIT "7" - MODIFICATION NO. III OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

(SCHEDULE A)

SCHEDULE A

Date: 1-22-68

Name of Project BINYUMAY CORPORATION (X) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

MCLP # 64-571

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) Cost per Rental Room
1. COST OF LAND ACQUISITION CITY OF NEW YORK		170,250		
a. No. of sq. ft. 12,967,785 @ 1.20 per sq. ft.		$ 15,561,342		
b. Carrying Charges & Expenses		$ 487,390		
c. Relocation and Other National Development Corp.		$ (200,000)	$ 16,018,982	$ 220
2. CONSTRUCTION COSTS Site Fill				
a. Demolition & Site Clearance Costs	$ 6,850,000			
b. Abnormal Foundations & Conditions-Piles	$ 7,200,000			
c. Residential Structures	$199,735,000			
d. Commercial Structures (If separate) and Community Bldgs.	$ 7,950,000			
e. Garages Structures (If separate)	$ 12,800,000			
f. Other Structures Power Plant	$ 22,216,000			
g. Site Work	$ 5,000,000			
h. Off-site work City	$ 2,829,750			
i. Premium on Bonds Test Boring	$ 850,000	$205,830,750		
j. Contingency allowance	400,000			
k. Contractor's Overhead & Profit 0.85%		$ 2,250,000	$208,080,750	$ 3,077
3. DEVELOPMENT FEE ____% of Items 2a.-i.			$	$
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,550,000		
b. Engineer's Inspection Fees		$ 350,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 200,000		
e. Preliminary Surveys		$ 400,000		
f. Legal Fees		$ 150,000	$ 3,850,000	$ 53
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 500,000		
b. Advertising & Promotion		$		
c. Other		$	$ 500,000	$ 7
6. CARRYING & FINANCING CHARGES				
a. Interest @ ____% for ____Months		$ 6,500,000		
b. R.E. Tax @ ____$ for ____Months on A.V. ____		$ 2,600,000		
c. Supervising Governmental Agency Fee 0.6% of 11+250M		$ 1,816,000		
d. Financing Expenses- H.F.A. Fee 0.5% of 11		$ 783,000		
e. Title and Recording Expenses		$ 353,000		
f. H.C. Administrative Expenses		250,000		
g. Surplus from Pre-Occupancy Operations	$	$(10,000,000)	$ 2,302,000	$ 32
7. ESTIMATED DEVELOPMENT COST			$290,751,732	$ 3,989
8. CONTINGENCY - ____% of Item 7.			$ 2,000,000	
9. WORKING CAPITAL - ____% of Item 7.			$ 1,051,068	$ 42
10. ESTIMATED PROJECT COST			$293,803,200	$ 4,031
11. MAXIMUM MORTGAGE LOAN - 88.83% of Item 10.			$261,000,000	3,581
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$ 32,803,200	$ 450
a. 1. No. of Class A Shares ____ x (Par Value) $ ____		$	$	
2. No. of Class B Shares 312,128 x (Par Value) $25.00		$32,803,200		
b. Income Debentures (Interest at ____%)		$	$32,803,200	
c. Capital Contribution			$	

No. of H.U. 15,372 No. of Rental Rooms 72,896

Cost per H.U. $ 18,914. (Item 7, Col. 3 ÷ No. of H.U.) Cost per Rental Room $ 3,989. (Item 7, Col. 4)

HFA-LPM-2.2A (8-66)

2 of 2

BEST COPY AVAILABLE

ANNEXED TO AFFIDAVIT OF JAY F. GORDON (SCHEDULE A)

MODIFICATION NUMBER IV

OF

CONSTRUCTION CONTRACT

THIS CONTRACT made as of the 9th day of October, 1969 by and between RIVERBAY CORPORATION (hereinafter referred to as the "Owner"), a domestic corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC. (hereinafter referred to as the "Contractor"), a domestic corporation authorized to do business in the State of New York, having an office at 465 Grand Street, New York, New York.

W I T N E S S E T H :

WHEREAS, the Owner and the Contractor entered into a Construction Contract dated as of June 18, 1965, relating to work to be performed by the Contractor in connection with the construction of the Co-op City Project, in the Borough of The Bronx, City of New York, as amended by Modification Number I of Construction Contract dated April 14, 1967 between the Owner and the Contractor, Modification Number II of Construction Contract dated January 22, 1968 between the Owner and the Contractor and Modification Number III of Construction Contract dated March 29, 1968 between the Owner and the Contractor, by reason of increases in the cost of the con-

struction of said Project and other changes (which Construction Contract, as so amended, is hereinafter referred to as the "Construction Contract"); and

WHEREAS, there has been a further increase in the cost of the construction of said Project, and a resulting further increase in the Building Loan, as reflected in Modification Number Three of Building Loan Agreement of even date herewith relating to said Project; and

WHEREAS, the parties hereto have agreed to amend further the Construction Contract to reflect such changes.

NOW, THEREFORE, it is agreed as follows:

1. Subparagraphs (d) and (e) of ARTICLE 1 of the Construction Contract are hereby deleted, and the following subparagraphs (d) and (e) are hereby substituted therefor:

"(d) Schedule 'A' dated September 15, 1969 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as 'Schedule 'A'.

"(e) Building Loan Agreement dated July 15, 1965 entered into by and between the Owner and the New York State Housing Finance Agency (hereinafter referred to as the 'Lender'), as amended by Modification Number One of Building Loan Agreement dated April 14, 1967 between the Lender and the Owner, Modification Number Two of Building Loan Agreement dated February 3, 1969 between the Lender and the Owner and Modification Number Three of Building Loan Agreement dated October 9, 1969 between the Lender and the Owner."

2. The first paragraph of ARTICLE 3 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Three Hundred Ten Million Five Hundred Thousand ($310,500,000) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided."

3. ARTICLE 5 of the Construction Contract is hereby deleted and the following ARTICLE 5 is hereby substituted therefor:

"ARTICLE 5 - Building Loan

The Contractor understands that the Work herein provided to be done is to be financed by a building loan secured by mortgages, the terms of which are set forth in the Building Loan Agreement dated July 15, 1965 between the Lender and the Owner, as amended by Modification Number One of Building Loan Agreement dated April 14, 1967 between the Lender and the Owner, Modification Number Two of Building Loan Agreement dated February 3, 1969 between the Lender and the Owner and Modification Number Three of Building Loan Agreement dated October 7, 1969 between the Lender and the Owner (plus such sums as may be received by the Owner on the sale of its stock to cooperator tenants)."

4. ARTICLE 19 of the Construction Contract is hereby deleted and the following ARTICLE 19 is hereby substituted therefor:

"ARTICLE 19 - Non-Auditable Allowances

The sum of $2,750,000, included in the above specified Contract Price, shall compensate the Contractor for the following items: Contractor's home office overhead in connection with the construction items of the Project; miscellaneous traveling and expediting costs; bookkeeping expenses; the Contractor's legal and accounting expenses."

5. The first paragraph of ARTICLE 20 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"ARTICLE 20 - Audits and Determination of Savings Under Contract

Within twenty (20) days after completion of the Project, but prior to the final payment for all the Work required hereunder, the Contractor shall deliver to the Owner and to the Division an audit prepared by the Contractor's Certified Public Accountant, certifying the total costs, charges and expenses heretofore and hereafter paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract within the scope of ARTICLE 1, but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in ARTICLE 19 hereof with respect to which no audit shall be made or delivered. To the total costs, charges and expenses incurred by the Contractor and/or the Owner in connection with this Contract, including change orders but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in ARTICLE 19 hereof there shall be added the sum of $2,750,000., to cover the costs and expenses set forth in ARTICLE 19 hereof, whether such costs and expenses be more or less than the said sum of $2,750,000. The total of the foregoing sums are hereafter in this article referred to as "total cost of the Work." If the total of the original Contract Price provided in this Contract, and the debit and credit change orders as agreed to by the parties hereto and approved by the Commissioner shall be greater than the "total cost of Work," the amount by which it exceeds the "total cost of the Work' shall be considered a saving. The Owner shall be entitled to such saving provided, however, that any surety shall not be liable for the return of such saving."

6. Schedule "A" dated as of September 15, 1969, annexed hereto, shall be and the same hereby is substituted for the Schedule "A" heretofore annexed to the contract.

7. All Supplemental Agreements previously executed pursuant to ARTICLE 2 of the Construction Contract are hereby deemed to be amended to bring the estimated costs set forth therein into conformity with the amounts listed in the Trade Payment Breakdown annexed hereto as Exhibit A.

8. All Work contemplated by changes to drawings and specifications approved by the Commissioner of Housing and

Community Renewal (hereinafter called the "Commissioner") on or before September 15, 1969 is included in the Contract Price as set forth in ARTICLE 3 of the Construction Contract, as amended by paragraph 2 of this Modification Number IV of Construction Contract. All Work contemplated by letter approvals issued by the Commissioner on or before September 15, 1969, whether or not incorporated in the revised plans and specifications, is included in said Contract Price.

9. Except as hereby amended, the Construction Contract remains in full force and effect and, in the event of any inconsistency between the Construction Contract and this Modification Number IV of Construction Contract, the provisions of the latter shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

RIVERBAY CORPORATION

By _____
President

COMMUNITY SERVICES, INC.

By _____
Vice President

APPROVED THIS 9th DAY OF OCTOBER, 1969

_____
Deputy Commissioner of Housing and Community Renewal of the State of New York.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October , 1969, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

EZRA N. GOODMAN
Notary Public, State of New York
No. 24-0900960
Qualified in Kings County
Commission Expires March 30, 1970

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October , 1969, before me personally came JULIUS GOLDBERG, to me known, who being by me duly sworn, did depose and say that he resides at No. 102 Manchester Street, Westbury, New York ; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

EZRA N. GOODMAN
Notary Public, State of New York
No. 24-0900960
Qualified in Kings County
Commission Expires March 30, 1970

SCHEDULE A 9/15/69

Date: 9-15- J

Name of Project RIVERBAY CORPORATION (HOUSING) N (Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

RCHP # 60-572

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) Cost per Rental Room
1. COST OF LAND ACQUISITION - City of New York		170,250		
a. No. of sq. ft. 12,967,785 1.20 per sq. ft.		$ 15,561,342		
b. Carrying Charges & Expenses		$ . . 487,390		
c. Relocation and other National Development Corp		$ (200,000)	$ 16,018,992	$ 220
2. CONSTRUCTION COSTS				
a. Conditioning-Site Work Costs Site Fill	$ 7,450,000			
b. Abnormal Foundations & Conditions (Piles)	$ 9,055,000			
c. Residential Structures and Community	$ 229,005,250			
d. Commercial Structures (If separate) Space	$ 10,500,000			
e. Garages Structures (If separate)	$ 13,650,000			
f. Other Structures Power Plant	$ 20,350,000			
g. Site work	$ 5,500,000			
h. Off-Site work	$ 2,829,750			
i. Trades on Parks	$ 950,000	$307,750,000		
j. Test Borings Contractors Overhead (Not included) 3 of Items 2a.-i. .89%		$ 2,750,000	$310,500,000	$ 4,250
3. DEVELOPER'S FEE 3 of Items 2a.-i		. . . . .	$	$ . . . .
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$. 2,975,000		
b. Engineer's Inspection Fees		$ . . . 975,000		
c. Laboratory Fees		$ . . . 200,000		
d. Soil Investigation		$ . . . 100,000		
e. Preliminary Surveys		$. 1,450,000		
f. Legal Fees		$ 200,000	$. 5,900,000	$ . . . 81
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ . . . 600,000		
b. Advertising & Promotion		$		
c. Other		$	$ . . 600,000	$ 8
6. CARRYING & FINANCING CHARGES				
a. Interest @ ____% for ____ Months		$ 18,500,000		
b. R.E. Tax @ ____% for ____ Months on A.V. ____		$. 7,900,000		
c. Supervising Governmental Agency Fee		$. 2,970,000		
d. Financing Expenses		$ . . . 990,000		
e. Title and Recording Expenses		$ . . 453,000		
f. H.C. Administrative Expenses		300,000		
g. Subsidy from Pre-occupancy		(4,600,000)		
h. Accounting Expenses	$	$	$ 26,513,000	$ . . 364
7. ESTIMATED DEVELOPMENT COST			$359,531,992	$ 4,932
8. CONTINGENCY - ____% of Item 7.			$. 1,000,000)	43
9. WORKING CAPITAL - ____% of Item 7.			$ 2,167,718)	
10. ESTIMATED PROJECT COST			$362,699,700	$ 4,975
11. PERMANENT MORTGAGE LOAN - 90.98% of Item 10			$330,000,000	4,527
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$. 32,699,700	$ . . 448
a. 1. No. of Class A Shares ____ x (Par Value) $____		$		
2. No. of Class B Shares) 307,988 x (Par Value) $25.00		$. 32,699,700		
b. Income Debentures (Interest at ____%)		$	$	
c. Capital Contribution			$	

No. of H.U. 15,372

Cost per H.U. $ 23,380.
(Item 7, Col. 3 No. of H.U.)

No. of Rental Rooms 72,890

Cost per Rental Room $ 4,930.
(Item 7, Col. 4)

HFA-LOM-2.24 (4-69)

RIVERBAY CORPORATION (HOUSING)
Summary of Trade Payment Breakdown
as revised 9/15/69

Stage	Description	Trades	Builder (Cost)	Total
1	Land Fill	7,450,000	67,500	7,517,500
2	Power Plant	15,350,000	138,500	15,488,500
3	Distribution System	9,000,000	81,300	9,081,300
4	Bldgs. 1-2-3 (Chevron)	17,670,750	148,400	17,819,150
5	Bldgs. 4-5 (Tricore)	15,068,540	135,700	15,204,240
6	Bldgs. 6-7-8 (Tower)	18,184,200	163,800	18,348,000
7	T. H. 301-304	1,345,150	11,600	1,356,750
8	T. H. 305-308	1,674,700	15,000	1,689,700
9	Garage 1-2	3,713,000	33,400	3,746,400
10	Comml. & Community Center S-1	5,900,000	50,700	5,950,700
11	Site Work - Riverbay	1,400,000	12,500	1,412,500
12	Site Work - NYC	665,000	4,870	669,870
Sub-Total	Section I	97,381,340	871,270	98,252,610
13	Bldg. 9 (Chevron)	5,850,250	52,600	5,902,850
14	Bldgs. 10-11 (Tricore)	15,068,540	135,700	15,203,740
15	Bldgs. 12-13-14 (Tower)	18,184,200	163,700	18,347,900
16	T. H. 309-314	1,885,350	16,900	1,902,250
17	Garage 3	1,856,500	16,700	1,873,200
18	Site Work - Riverbay	900,000	8,100	908,100
19	Site Work - NYC	485,000	3,900	488,900
Sub-Total	Section II	44,209,840	397,600	44,607,440
20	Bldgs. 15-16 (Chevron)	11,780,600	105,900	11,886,500
21	Bldgs. 17-18-19 (Tower)	18,184,200	163,700	18,347,900
22	T. H. 315-317	682,600	7,600	690,200
23	Garage 4	1,856,500	16,700	1,873,200
24	Comml.& Community Center S-2	5,900,000	54,700	5,954,700
25	Site Work - Riverbay	800,000	7,100	807,100
26	Site Work - NYC	372,000	2,900	374,900
Sub-Total	Section III	30,776,800	358,600	40,134,800
27	Bldgs. 20-21 (Telcoro)	15,068,540	135,700	15,203,740
28	Bldg. 22 (Chevron)	5,890,250	52,600	5,942,850
29	Bldgs. 23-24-25 (Tower)	18,184,200	163,200	18,347,400
30	T. H. 318-324	2,592,000	23,200	2,616,200
31	T. H. 325-329	1,795,500	16,100	1,811,600
32	Garages 5-6	3,713,000	33,400	3,746,400
33	Site Work - Riverbay	900,000	8,100	908,100
34	Site Work - NYC	504,000	3,610	507,610
Sub-Total	Section IV	48,648,490	435,610	49,084,300

EXHIBIT "A"

(EXHIBIT "A" - SUMMARY OF TRADE PAYMENT BREAKDOWN)

RIVERBAY CORPORATION (CO-OP CITY)
Summary of Trade Payment Breakdown
as revised 9/15/69

- page 2 -

Stage	Description	Trades	Builders Overhead	Total
35	Bldgs. 26-27-28-29 (Tricore)	30,137,080	270,400	30,407,480
36	Bldgs. 30-31-32 (Chevron)	17,670,750	158,400	17,829,150
37	Bldgs. 33-34-35 (Tower)	18,184,200	163,200	18,347,400
38	T. H. 330-333	1,594,800	14,300	1,609,100
39	Garages 7-8	3,713,000	33,400	3,746,400
40	Comml. & Community Center S-3	2,700,000	25,230	2,725,230
41	Site Work - Riverbay	1,500,000	13,400	1,513,400
42	Site Work - NYC	823,750	6,220	829,970
Sub-Total	Section V	76,323,580	684,550	77,008,130

RECAPITULATION

Section I	97,381,340	875,070	98,256,410
" II	44,269,790	396,560	44,666,350
" III	39,776,800	358,010	40,134,810
" IV	48,648,490	435,810	49,084,300
" V	76,323,580	684,550	77,008,130
Borings	400,000	- -	400,000
Premium on Bonds	950,000	- -	950,000
Total	307,750,000	2,750,000	310,500,000

EXHIBIT "A" (Continued)

EXHIBIT "9" - MODIFICATION NO. V OF CONSTRUCTION CONTRACT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER V

OF

CONSTRUCTION CONTRACT

THIS CONTRACT made as of the 7th day of July, 1971 by and between RIVERBAY CORPORATION (hereinafter referred to as the "Owner"), a domestic corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at 465 Grand Street, New York, New York and COMMUNITY SERVICES, INC. (hereinafter referred to as the "Contractor"), a domestic corporation authorized to do business in the State of New York, having an office at 465 Grand Street, New York, New York,

W I T N E S S E T H :

WHEREAS, the Owner and the Contractor entered into a Construction Contract dated as of June 18, 1965, relating to work to be performed by the Contractor in connection with the construction of the Co-op City Project, in the Borough of The Bronx, City of New York, as amended by Modification Number I of Construction Contract dated April 14, 1967 between the Owner and the Contractor, Modification Number II of Construction Contract dated January 22, 1968 between the Owner and the Contractor, Modification Number III of Construction Contract dated March 29, 1968 between the Owner and the Contractor and Modification Number IV of Construction Contract dated

October 9, 1969 between the Owner and the Contractor, by reason of increases in the cost of the construction of said Project and other changes (which Construction Contract, as so amended, is hereinafter referred to as the "Construction Contract"); and

WHEREAS, there has been a further increase in the cost of the construction of said Project, and a resulting further increase in the Building Loan, as reflected in Modification Number Four of Building Loan Agreement of even date herewith relating to said Project; and

WHEREAS, the parties hereto have agreed to amend further the Construction Contract to reflect such changes.

NOW, THEREFORE, it is agreed as follows:

1. Subparagraphs (d) and (e) of ARTICLE 1 of the Construction Contract are hereby deleted, and the following subparagraphs (d) and (e) are hereby substituted therefor:

> "(d) Schedule 'A' dated May 1, 1971 made by the Owner and approved by the Division, a copy of which Schedule is attached hereto and made a part hereof, hereinafter referred to as 'Schedule 'A''.
>
> (e) Building Loan Agreement dated July 15, 1965 entered into by and between the Owner and the New York State Housing Finance Agency (hereinafter referred to as the 'Lender'), as amended by Modification Number One of Building Loan Agreement dated April 14, 1967 between the Lender and the Owner, Modification Number Two of Building Loan Agreement dated February 3, 1969 between the Lender and the Owner, Modification Number Three of Building Loan Agreement dated October 9, 1969 between

> the Lender and the Owner and Modification Number Four of Building Loan Agreement dated July 7, 1971 between the Lender and the Owner."

2. The first paragraph of ARTICLE 3 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

> "The Owner shall pay the Contractor for the performance of the Work embraced by this Contract, subject to additions and deductions provided herein, the sum of Three Hundred Forty Million Five Hundred Thousand ($340,500,000) Dollars (hereinafter referred to as the "Contract Price"), subject to the method of payment hereinafter provided."

3. ARTICLE 5 of the Construction Contract is hereby deleted and the following ARTICLE 5 is hereby substituted therefor:

> "ARTICLE 5 - Building Loan
>
> The Contractor understands that the Work herein provided to be done is to be financed by a building loan secured by mortgages, the terms of which are set forth in the Building Loan Agreement dated July 15, 1965 between the Lender and the Owner, as amended by Modification Number One of Building Loan Agreement dated April 14, 1967 between the Lender and the Owner, Modification Number Two of Building Loan Agreement dated February 3, 1969 between the Lender and the Owner, Modification Number Three of Building Loan Agreement dated October 9, 1969 between the Lender and the Owner and Modification Number Four of Building Loan Agreement dated July 7, 1971 between the Lender and the Owner (plus such sums as may be received by the Owner on the sale of its stock to co-operator tenants)."

4. ARTICLE 19 of the Construction Contract is hereby deleted and the following ARTICLE 19 is hereby substituted therefor:

> "ARTICLE 19 - Non-Auditable Allowances
>
> The sum of $3,050,000, included in the above spe-

cified Contract Price, shall compensate the Contractor for the following items: Contractor's home office overhead in connection with the construction items of the Project; miscellaneous traveling and expediting costs; bookkeeping expenses; the Contractor's legal and accounting expenses."

5. The first paragraph of ARTICLE 20 of the Construction Contract is hereby deleted and the following paragraph is hereby substituted therefor:

"ARTICLE 20 - Audits and Determination of Savings Under Contract

Within twenty (20) days after the completion of the Project, but prior to the final payment for all the Work required hereunder, the Contractor shall deliver to the Owner and to the Division an audit prepared by the Contractor's Certified Public Accountant, certifying the total costs, charges and expenses heretofore and hereafter paid and/or incurred by the Contractor and/or the Owner in the performance of this Contract within the scope of ARTICLE 1, but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in ARTICLE 19 hereof with respect to which no audit shall be made or delivered. To the total costs, charges and expenses incurred by the Contractor and/or the Owner in connection with this Contract, including change orders but exclusive of all sums paid and/or incurred by the Contractor for the items set forth in ARTICLE 19 hereof there shall be added the sum of $3,050,000, to cover the costs and expenses set forth in ARTICLE 19 hereof, whether such costs and expenses be more or less than the said sum of $3,050,000. The total of the foregoing sums are hereafter in this article referred to as the 'total cost of the Work.' If the total of the original Contract Price provided in this Contract, and the debit and credit change orders as agreed to by the parties hereto and approved by the Commissioner shall be greater than the 'total cost of the Work', the amount by which it exceeds the 'total cost of the Work' shall be considered a saving. The Owner shall be entitled to such saving provided, however, that any surety shall not be liable for the return of such saving."

6. Schedule "A" dated as of May 1, 1971, annexed

hereto, shall be and the same hereby is substituted for the Schedule "A" heretofore annexed to the contract.

7. All Supplemental Agreements previously executed pursuant to ARTICLE 2 of the Construction Contract are hereby deemed to be amended to bring the estimated costs set forth therein into conformity with the amounts listed in the Trade Payment Breakdown annexed hereto as Exhibit A.

8. All Work contemplated by changes to drawings and specifications approved by the Commissioner of Housing and Community Renewal (hereinafter called the "Commissioner") on or before May 1, 1971 is included in the Contract Price as set forth in ARTICLE 3 of the Construction Contract, as amended by paragraph 2 of this Modification Number V of Construction Contract. All Work contemplated by letter approvals issued by the Commissioner on or before May 1, 1971, whether or not incorporated in the revised plans and specifications, is included in said Contract Price.

9. Except as hereby amended, the Construction Contract remains in full force and effect and, in the event of any inconsistency between the Construction Contract and this Modification Number V of Construction Contract, the provisions of the latter shall govern.

IN WITNESS WHEREOF, the parties hereto have executed

this agreement as of the day and year first above written.

RIVERBAY CORPORATION

By _____
Vice President

COMMUNITY SERVICES, INC.

By _____
Vice President

APPROVED THIS 2nd DAY OF JULY, 1971

_____
Commissioner of Housing and Community
Renewal of the State of New York

EXHIBIT "9" - MODIFICATION NO. V OF CONSTRUCTION CONTRACT -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 7th day of July, 1971, before me personally came GEORGE SCHECHTER, to me known, who being by me duly sworn, did depose and say that he resides at No. 20B Defoe Place, Bronx, New York; that he is the Vice President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Burt Allen Solomon

BURT ALLEN SOLOMON
Notary Public, State of New York
No. 31-9105500
Qualified in New York County
Commission Expires March 30, 1972

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 7th day of July, 1971, before me personally came JULIUS GOLDBERG, to me known, who being by me duly sworn, did depose and say that he resides at No. 102 Manchester Street, Westbury, New York; that he is the Vice President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Burt Allen Solomon

BURT ALLEN SOLOMON
Notary Public, State of New York
No. 31-9107500
Qualified in New York County
Commission Expires March 30, 1972

Building Loan Agreement

AGREEMENT, dated the 15th day of July, 1965, between New York State Housing Finance Agency, a corporate governmental agency created under and pursuant to the provisions of the New York State Housing Finance Agency Act (hereinafter referred to as the "Lender") having its principal office at 393 Seventh Avenue, Borough of Manhattan, City, County and State of New York and .....RIVERBAY CORPORATION....., a corporation organized and existing under and by virtue of the Limited Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having its principal office at.....465 Grand Street....., Borough of...Manhattan..., City and State of New York (hereinafter referred to as the "Borrower");

WHEREAS, the Borrower has applied to the Lender for a loan of money (hereinafter referred to as the "Mortgage Loan") to aid the Borrower in erecting and equipping certain buildings and improvements (hereinafter referred to as the "Project") upon the premises described in Schedule A, annexed hereto and made a part hereof, and the Lender is prepared to make the Mortgage Loan upon the conditions hereinafter set forth;

WHEREAS, to provide for the issuance of Non-Profit Housing Project Bonds (hereinafter referred to as "Bonds") in order to obtain from time to time monies with which to make mortgage loans, the Lender has adopted, on April 2, 1965, its Non-Profit Housing Project Bond Resolution (hereinafter referred to as the "Bond Resolution"), and proposes to adopt one or more resolutions authorizing the issuance of Non-Profit Housing Bond Anticipation Notes (hereinafter referred to as "Notes") for the same purpose;

WHEREAS, the monies borrowed by the Lender through the issuance of Bonds and Notes for the purpose of paying interest on the Bonds and Notes issued by the Lender to obtain funds with which to make this loan to the Borrower shall constitute a part of, and be included in the computation of this Mortgage Loan;

NOW, THEREFORE, the parties agree:

I. The Lender agrees to make, and the Borrower agrees to accept, a loan of ...Two Hundred Thirty-Six Million Six Hundred Fifty-Five Thousand Seven Hundred Ten ($236,655,710...) Dollars, to be advanced as herein provided, and to be evidenced by the Borrower's note executed simultaneously herewith, and payable with interest and amortization as therein provided and secured by a mortgage (hereinafter referred to as the "Mortgage") on the premises described in Schedule A.

FEES AND CHARGES

(1) That on the first day of the month following an advance to the Borrower by the Lender on this Mortgage Loan and on the first day of each month thereafter, as scheduled by the Lender, until the Lender has issued Bonds for the purpose of obtaining monies to make this Mortgage Loan or for the purpose of funding Notes issued to obtain such monies, the Borrower will pay to the Lender, at the office of the Lender, or at such other place as the Lender may designate, such fees and charges (hereinafter referred to as "Fees and Charges") as the Lender, in its sole discretion, shall determine in order to reimburse the Lender for the following costs and expenses of the Lender in connection with the making of this Mortgage Loan:

(a) the administrative expenses of the Lender;

(b) the costs and expenses of the Lender incurred in connection with the authorization, issuance, sale and delivery of its Notes issued with respect to the Project of the Borrower;

(c) re-imbursement by the Lender to the Division of Housing and Community Renewal of the State of New York (hereinafter referred to as the "Division") for the reasonable costs of services performed by the New York State Commissioner of Housing and Community Renewal, or his duly authorized representative (hereinafter collectively referred to as the "Commissioner") and the Division for the Lender pursuant to the New York State Housing Finance Agency Act; and

(2) That on the first day of the month after the Lender has issued Bonds for the purpose of obtaining monies to make this Mortgage Loan or for the purpose of funding Notes issued to obtain such monies and on the first day of each month thereafter as scheduled by the Lender, the Borrower will pay to the Lender, at the office of the Lender, or at such other place as the Lender may designate, such Fees and Charges as the Lender, in its sole discretion, shall determine to be sufficient, together with other monies available for such purposes under the provisions of the Bond Resolution,

(a) to provide the amounts required to pay the principal of and interest on the Borrower's Debt Service Reserve Fund Obligations, as determined by the Lender in accordance with the applicable provisions of the Bond Resolution;

(b) to pay, as the same become due, the Borrower's allocable proportion of the administrative expenses of the Lender;

(c) to pay, as the same become due, the costs and expenses of the Lender incurred in connection with the authorization, issuance, sale and delivery of its Bonds and Notes issued with respect to the Project of the Borrower;

(d) to pay, as the same become due, the Borrower's allocable proportion of the fees and expenses of the Trustee, Depository, and Paying Agents under the Bond Resolution;

(e) to provide for the re-imbursement by the Lender to the Division of the Borrower's allocable proportion of the reasonable costs of services performed by the Commissioner and the Division for the Lender pursuant to the New York State Housing Finance Agency Act; and

(f) to provide the amounts required to pay the Borrower's State Repayment Obligation, as determined by the Lender in accordance with the applicable provisions of the Bond Resolution.

For the purposes of subparagraphs (b), (d) and (e) of this subsection (2), above, the term "Borrower's allocable proportion" shall mean the proportionate amount of the total requirement determined by the ratio that Borrower's total Mortgage Loan bears to the total of all the mortgage loans made by the Lender from the proceeds of Bonds issued for the purpose of obtaining monies to make mortgage loans or for the purpose of funding Notes or refunding Bonds issued to obtain such monies.

II. The Borrower will construct on the premises the following described Project on or before ...August 1, 1970.....:

Thirty-nine fireproof apartment buildings, ten of which shall be 24 stories, fourteen of which shall be 27 stories and fifteen of which shall be 34 stories, containing an aggregate of 15,500 apartments, commercial buildings containing approximately 6,200,000 cubic feet, a community center, a power plant building and on-site parking facilities for 10,850 cars.

For the purposes of developing the entire Project, the construction of any part thereof shall be in accordance with such stages as shall be determined by the Borrower, subject to the written approval of the Commissioner and the Lender. The construction shall be performed in such stages and in accordance with the plans and specifications approved in writing in advance by the Commissioner with respect to each such stage.

III. Said loan shall be advanced at such times and in such amounts as the Lender shall determine, subject to the certification in writing from the Commissioner, that such advance is then payable and due under and in accordance with the terms and conditions of this agreement and a certain construction contract approved by the Commissioner, less such holdback on advances as provided in said construction contract. At any time after 50% of the construction has been completed for any stage of construction determined in accordance with Paragraph II hereof, if the Borrower and the Commissioner agree, advances may be made for the construction completed after such agreement for such stage of construction without making any holdback deduction and for the difference, if any, between the amount of holdback at the time of such agreement and the amount of holdback applicable when 50% of the construction for such stage of construction was completed. After the Commissioner has determined that any such stage of construction has been substantially completed, the remaining holdback for such stage of construction may be paid from time to time and in such amounts as the Commissioner shall approve. However, at no time will any advance or payment be made by the Lender to the Borrower which would result in a loan in excess of eighty-eight & 40/100 per cent (88.4%) of the then "Project Cost", as defined and determined in accordance with the provisions of the Limited-Profit Housing Companies Law at the time of each such advance or payment. As part of the consideration to the Lender hereunder, the Lender shall have the right, if the Lender believes it advisable so to do, to make any given advance of mortgage proceeds when the Borrower shall be entitled to same in accordance with the terms of this agreement, notwithstanding that the Borrower shall not have requested such advance or shall have refused to accept same, and all such advances shall be deemed to have made in pursuance of this agreement and not to be in contravention or in modification thereof.

IV. Prior to any advance hereunder and as a condition precedent to each advance, the Borrower shall obtain all governmental approvals then required by law for the acquisition, construction, ownership and operation of the Project by the Borrower. The Borrower shall submit evidence satisfactory to the Lender and the Commissioner of such approvals. The Borrower shall furnish to the Lender, on or before the making of the final advance, the final certificates of approval, including the permanent certificates of occupancy, of the various governmental authorities having jurisdiction and the certificates of the Board of Fire Underwriters acting in and for the locality in which the Project is situated.

V. No advance shall be due unless in the judgment of the Lender, subject to the certification of the Commissioner, that all work usually done at the stage of construction attained when the advance is requested has been done in good and workmanlike manner and all materials, supplies, chattels and fixtures usually furnished and installed at such stage of construction have been furnished and installed, or properly stored on site or off site and properly insured as approved by the Commissioner, and the Lender; nor unless the Lender is satisfied, subject to the certification of the Commissioner, that construction of the improvements at the stage for which the advance is required is proper. The making of any advance or part thereof shall not be deemed an approval or acceptance by the Lender or Commissioner of the work theretofore done. The Lender shall have no obligation to make any advance or part thereof after the happening of any of the events specified in Article XII of this agreement but shall have the right and option so to do, provided, however, that if it elects to make any such advance no such advance shall be deemed a waiver of the right to demand payment of the debt, or any part thereof, or an obligation to make any other advance. All advances are to be made at the principal office of the Lender, or at such place as the Lender may designate and the Lender may require fifteen (15) days' prior notice in writing before the making of any such advance.

VI. The Borrower shall furnish, or cause to be furnished, to the Lender, before the execution of this agreement, mortgage title insurance or certificates thereof, issued by a Title Insurance Company or Companies, satisfactory to the Lender, and in such amounts as shall be

required by the Lender, insuring the interest of the Lender as mortgagee as a valid first lien on the real estate, free and clear of all liens and encumbrances which in the opinion of the Lender and the Commissioner do not materially affect the value or usefulness of such real estate for the intended use thereof. No advance shall be due, and it shall be a condition precedent to each advance that such title company shall continue its search to the date of each such advance and shall certify to the Lender in writing that such continuation discloses no liens or encumbrances affecting such real estate, which in the opinion of the Lender and the Commissioner do not materially affect the value or usefulness of such real estate for the intended use thereof.

VII. Prior to any advance hereunder and as a condition precedent to each advance, the Borrower shall furnish, or cause to be furnished, or the Lender may procure at the expense of the Borrower, surveys made by a licensed surveyor satisfactory to the Lender, the Commissioner and the Title Insurance Company or Companies insuring the interest of the Lender as mortgagee. Said surveys shall be certified to the Lender, the Commissioner and said Title Insurance Company or Companies and shall show such items as the Lender or the Commissioner may from time to time require.

VIII. The Lender may extend the time for payment of the sums owing under the Mortgage Loan and any such extension shall be deemed to be in pursuance of this agreement and not in modification thereof.

IX. When required by the Lender, the Borrower shall furnish to the Lender, premium prepaid, or the Lender may procure at the Borrower's expense, fire and other hazard insurance policies (in builders risk completed value form, including extended coverage) covering the buildings and all fixtures and articles of personal property now installed therein, attached thereto or used in connection therewith, in companies, forms and amounts satisfactory to the Lender and the Commissioner.

X. In the event the Borrower shall part with or be in any manner whatever deprived of its title to the premises described herein, the Lender may, at its option, continue to make advances under this agreement, and subject to all its terms and conditions, to such person or persons as may succeed to the Borrower's title and interest, and all sums so advanced shall be deemed advances under this agreement, secured by the Mortgage.

XI. The Lender may pay any amount necessary for the payment of any expenses relating to the examination of the title to said premises including costs of surveys, drawing of papers and other fees and expenses of counsel, documentary stamps, and any expenses incurred in the procuring and making of this Mortgage Loan, and in the payment of any encumbrance, tax, assessment or other charge or lien upon the said premises and any other amounts necessary for the payment of the cost of the improvements as defined by the Lien Law. All such payments, as well as any and all sums paid or expended by the Lender pursuant to any of the provisions of this agreement, shall be deemed advances to the Borrower under this agreement and secured by the Mortgage.

XII. The Borrower agrees not to do any act or thing prohibited by the terms of this agreement, and whenever and as often as any of the following events occur, any obligation on the Lender's part to make this Mortgage Loan or any advances hereunder shall cease if the Lender so elects, and the Note and Mortgage shall at the option of the Lender become immediately due and payable, but the Lender may make advances without becoming obligated to make any other or further advances:

(a) If the Borrower fails to comply with any of the covenants or provisions of this agreement or of the Note and Mortgage;

(b) If the Borrower fails to comply with any of the provisions of the Limited-Profit Housing Companies Law;

(c) If under the Mortgage, the Lender does not obtain a lien for the indebtedness intended to be secured thereby on the premises above set forth satisfactory to Lender and its counsel and the Commissioner;

(d) If Lender or its counsel or the Commissioner shall disapprove of any requested advance because of some act, omission, lien, encumbrance, or structural defect occurring

BEST COPY AVAILABLE

at any time after the commencement of construction or not previously discovered or objected to by Lender or its counsel or the Commissioner;

(e) If the Borrower assigns this contract or any of the advances or any interest therein, or its right to receive any advance or portion thereof, or if said premises be conveyed or encumbered in any manner without the consent of the Lender, except for mortgages or leases which are and which shall remain subordinate in lien and effect to the lien of the Mortgage securing this agreement, or if the Borrower shall by operation of law be deprived of its rights hereunder;

(f) If a building or any portion thereof shall encroach beyond the subject property lines or on any easement over the premises or violate the requirements of any governmental authority having jurisdiction, or if any adjoining building shall encroach upon the premises above described or on any dominant easement appurtenant thereto;

(g) If the improvements on said premises be, in the judgment of the Lender, materially injured or destroyed by fire or other cause;

(h) If a petition in bankruptcy be filed by or against the Borrower or the then owner, or a receiver or trustee of the property of the Borrower or the then owner be appointed, or if the Borrower or the then owner makes an assignment for the benefit of creditors or is adjudged insolvent by any State or Federal court, except that in the case of an involuntary petition, action or proceeding for the adjudication as a bankrupt or for the appointment of a receiver or trustee of the property of the Borrower or the then owner not initiated by the Borrower or the then owner, the Borrower or the then owner shall have sixty (60) days after the service of such petition or the commencement of such action or proceeding, as the case may be, within which to obtain a dismissal of such petition, action or proceeding, provided that the Borrower is not otherwise in default under the terms of the Mortgage, including, but not limited to, the payment of interest, principal and any other payments;

(i) If the Borrower does not erect and equip the Project in a good and workmanlike manner in accordance with the plans and specifications approved by all governmental authorities having jurisdiction, by the Lender and by the Commissioner; or fails to comply immediately with any requirement or notice of violation of law issued by or filed in any department of any governmental authority having jurisdiction of the Project or the Borrower by reason of any matter in or concerning the construction of the Project, or fails to furnish to the Lender when requested official searches made by governmental authorities having jurisdiction;

(j) If the construction of Project be at any time discontinued or not carried on with reasonable dispatch in the judgment of the Lender or of the Commissioner, no matter what the cause therefor may be;

(k) If the Lender or the Commissioner is not permitted, at all reasonable times, to inspect and audit all books and records of Borrower, to enter upon said premises, inspect the Project and the construction thereof and all materials, fixtures and articles used or to be used in the construction and to examine all detailed plans, shop drawings and specifications which are or may be kept at the Project site, or if the Borrower shall fail to furnish to the Lender, or the Commissioner when requested, copies of such plans, drawings or specifications;

(l) If any of the materials, fixtures or articles used in the construction of the Project or appurtenances thereto or to be used in the operation thereof be not in compliance with the plans and specifications and any changes therein approved by the Commissioner;

(m) If the Borrower executes any conditional bill of sale or chattel mortgage covering any materials, fixtures or articles used in the construction of the Project or appurtenances thereto, or articles of personal property included in the Project, or if any of such materials, fixtures or articles be not purchased so that the ownership thereof will vest unconditionally in the Borrower, free from encumbrance, on delivery at the premises, or if the Borrower does not produce for the Lender upon demand the contracts, bills of sale, statements, receipted vouchers, or agreements, or any of them under which the Borrower claims title to such materials, fixtures and articles;

(n) If the Borrower does not disclose to the lender or the Commissioner upon demand, the names of all persons with whom the Borrower contracted or intends to contract for the construction of the Project or the furnishing of labor or materials therefor, and furnish thereto copies of subcontracts within thirty (30) days after execution of each subcontract, or, when so required by the Lender or Commissioner, fails to obtain their acceptance of such subcontracts;

(o) If the Project, in the sole discretion of the Lender, is not completed on or before the date set forth in Paragraph II hereof, or on or before the date of any extensions thereof granted or approved by the Commissioner.

XIII. Notices from the Lender to the Borrower may be given by mailing the same to the Borrower at its address above set forth, and any notice so given shall be deemed to be sufficient for all purposes.

XIV. The Borrower covenants that it will receive the advances to be made hereunder and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of the improvements and that it will apply the same first to the payment of the cost of improvements before using any part of the total of the same for any other purpose.

XV. The Borrower covenants that the affidavit attached hereto and made a part hereof and marked SCHEDULE B is made pursuant to and in compliance with Section 22 of the Lien Law.

XVI. The Borrower within three (3) days upon request in person or within five (5) days upon request by mail will furnish an estoppel certificate or written statement, duly acknowledged of the amount advanced to it under this agreement and/or the amount due on the Mortgage and whether any offsets or defenses exist hereunder or against this Mortgage Loan.

XVII. The Note and Mortgage to be delivered pursuant to this agreement shall be made subject to all the provisions of this agreement, to the same extent and effect as if the provisions of this agreement were fully set forth and made a part thereof, and if the Borrower shall fail to keep, observe or perform any of the provisions of the Note and Mortgage or of this agreement or if the obligor or maker or mortgagor under the Note and Mortgage shall fail to keep, observe or perform any of the provisions thereof, the amount secured thereby shall, at the option of the Lender, become immediately due and payable.

XVIII. If the Borrower at any time prior to the completion of the Project abandons the same or ceases work thereon or fails to complete the Project strictly in accordance with the plans and specifications, except as to changes approved by the Commissioner, or makes changes in the plans and specifications without first securing written approval of the Commissioner or otherwise fails to comply with the terms hereof, then the Lender, at its option, may forthwith enter into possession of the premises and perform any and all work and labor necessary to complete the Project substantially in accordance with the plans and specifications and employ watchmen to protect the premises and the Project under construction from injury; all sums so expended by the Lender shall be deemed to have been paid to Borrower and secured by the Mortgage. For this purpose, the Borrower hereby constitutes and appoints the Lender its true and lawful attorney-in-fact with full power of substitution to complete the Project in the name of the Borrower, and hereby empowers said attorney as follows: to use any funds of the Borrower including any balance which may be held in escrow and any funds which may remain unadvanced hereunder for the purpose of completing the Project in the manner called for by the plans and specifications; to make additions and changes and corrections in the plans and specifications which shall be necessary or desirable to complete the Project in substantially the manner contemplated by the plans and specifications; to employ such contractors, subcontractors, agents, architects and inspectors as shall be required for said purposes; to pay, settle or compromise all existing bills and claims which are or may be liens against the said premises, or as may be necessary or desirable for the completion of the work, or for the clearance of title; execute all applications and certificates in the name of the Borrower which may be required by any of the contract documents and to do any and every act which the Borrower might do in its own behalf. It is further understood and agreed that this power-of-attorney shall be deemed to

be a power coupled with an interest which cannot be revoked. Said attorney shall also have power to prosecute and defend all actions or proceedings in connection with the construction of the Project or mortgaged premises and to take such action and require such performance as is deemed necessary. The Borrower hereby assigns and quitclaims to the Lender all sums to be advanced hereunder and all sums in escrow conditioned upon the use of said sums if any, in trust, in completion of the Project, such assignment to become effective, however, only in case of the Borrower's default.

XIX. The Borrower shall furnish or cause to be furnished such performance and payment bonds as the Commissioner and Lender shall require. If it becomes necessary for a Surety Company or Companies (hereinafter called the "Surety") furnishing to the Lender performance and payment bonds covering the Project or any part thereof, to arrange for completion of the Project, the Lender shall, in case the Project is continued as provided in this agreement, continue to make advances under this agreement and the aforementioned construction contract and subject to all their terms and conditions, to the Surety, and all sums so advanced by the Lender shall be deemed advances under this agreement and not to be modifications thereof, as if made to the Borrower, and shall be secured by the Mortgage.

XX. The proceeds of this loan herein described will be used in part to reimburse the Borrower for payments made prior to the initial advance hereunder for items of "cost of improvement" as defined in subdivision 5 of Section 2 of the Lien Law, which payments for items of "cost of improvement" were all made subsequent to the commencement of the improvement herein provided for.

XXI. Except as herein otherwise provided, this agreement may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

NEW YORK STATE HOUSING FINANCE AGENCY

By .....
Executive Director

(SEAL)

Attest:
.....

(SEAL) RIVERBAY CORPORATION

By .....
President

Attest:
.....
Assistant Secretary

Approved: July 15, 1965

.....
Commissioner of Housing and Community Renewal

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 15th day of July, 1965, before me personally came Paul Belica to me known, who, being by me duly sworn, did depose and say that he resides at 359 Cedar Drive, Briarcliff Manor, New York, that he is Executive Director of the New York State Housing Finance Agency, the Agency described in and which executed the foregoing instrument; that he knows the seal of said Agency; the seal affixed to said instrument is the official seal of said Agency; that it was so affixed by order of the Members of said Agency, and that he signed his name thereto by like order.

ROY GAINSBURG
Notary Public, State of New York
No. 31-1257350
Qualified in New York County
Commission Expires March 30, 1967

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 15th day of July, 1965, before me personally came Abraham E. Kazan to me known, who, being by me duly sworn, did depose and say that he resides at 130 Gale Place, Bronx, New York, that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

ROY GAINSBURG
Notary Public, State of New York
No. 31-1257350
Qualified in New York County
Commission Expires March 30, 1967

BEST COPY AVAILABLE

SCHEDULE A

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly described in Schedule A-1 annexed hereto as Parcel I.

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly described in Schedule A-1 annexed hereto as Parcel II.

Together with all the right, title and interest of the Mortgagor, if any, of, in and to beds of the streets, roads and avenues, and any easements over property, in front of and adjoining the above-described premises;

Together with any and all structures, buildings and improvements and replacements thereof and additions thereto, now or at any time hereafter constructed, erected, installed or placed in or upon the above-described real estate and any and all fixtures, fittings, appliances, apparatus, equipment, machinery, chattels and articles of personal property, including but not limited to steam and hot water boilers, pipes, radiators, bath tubs, water-closets, refrigerators, gas and electrical fixtures, ranges and replacements thereof, now or at any time hereafter affixed to, attached to, placed upon or used or stored on or off the site or in any way connected with the complete and comfortable use, enjoyment, occupancy or operation of the plant of the said mortgaged premises (excepting only removable trade fixtures and other personal effects owned or possessed by the tenants who may occupy the mortgaged premises).

SCHEDULE A-1

PARCEL I

ALL that certain plot, piece or parcel of land situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

BEGINNING at the intersection of the easterly side of Hutchinson River Parkway Extension as legally opened July 19, 1941, with the westerly U.S. Pierhead and Bulkhead Line of the Hutchinson (Eastchester Creek) River, as approved by the Secretary of War October 28, 1940, having coordinates North 31,848.67 West 21,256.51; thence along said U. S. Pierhead and Bulkhead Line the following bearings and distances; South 50 degrees, 45 minutes 28.7 seconds East 123.589 feet; South 16 degrees 59 minutes 47.6 seconds East 615.405 feet; South 4 degrees 30 minutes 56.5 seconds East 706.572 feet and South 12 degrees 13 minutes 19.5 seconds West 460.965 feet; thence South 48 degrees 02 minutes 53 seconds East 331.061 feet to the southerly U. S. Pierhead and Bulkhead Line of Givans Creek as approved by the Secretary of War October 28, 1940; thence along the westerly U.S. Pierhead and Bulkhead Line of Hutchinson River, South 53 degrees 57 minutes 51.9 seconds East 5.010 feet to the northerly property line of land now or formerly of the New York, New Haven and Hartford Railroad Company; thence along said northerly property line of said railroad on a curve to the right having a radius of 2,192.50 feet, a distance of 370.27 feet; thence still along said northerly property line of said railroad South 39 degrees 41 minutes 21.4 seconds East a distanceof 20.00 feet; thence still along said northerly property line of said railroad on a curve to the right, having a radius of 2,507.3 feet a distance of 705.37 feet; thence still along said northerly property line of said railroad South 66 degrees 25 minutes 47 seconds West a distance of 404.07 feet to the prolongation southerly of the easterly side of Hunter Avenue (Lorillard Avenue) as laid out on Map of Pelham Park by C. J. Byrne, July 4, 1873, filed Westchester County September 20, 1873, as Map No. 599; thence northerly along said prolongation and along the easterly line of said Hunter Avenue as laid out on said map 559.32 feet to a point in the most southerly line of Lot 51 in Block 5135 on the Tax Map of the City of New York for the Borough of Bronx; thence westerly along said most southerly line of said tax lot 51 in Block 5135 a distance of 150.00 feet to the westerly line of said tax lot 51; thence northerly along said last mentioned line 150.00 feet to the southerly line of said tax lot 51; thence westerly along said last mentioned line 100.00 feet to the easterly side of Boller Avenue (Sea View Avenue) as shown on Map No. 599 above mentioned; thence northerly along said easterly side of

SCHEDULE A-1 (Continued)

Boller Avenue 306.85 feet to the easterly or southeasterly side of Hutchinson River Parkway Extension; thence northeasterly along the southeasterly side of said Hutchinson River Parkway Extension as presently laid out the following four courses and distances: (1) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,102.34 feet; (2) North 66 degrees 58 minutes 06.6 seconds East a distance of 29.85 feet; (3) North 16 degrees 59 minutes 47 seconds West a distance of 20.81 feet; (4) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,291.32 feet to the point or place of BEGINNING.

PARCEL II

ALL that certain lot, piece or parcel of land situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly bounded and described as follows:

BEGINNING at a point on the easterly boundary of the New England Thruway as laid out on a map filed May 17, 1948, as Map No. 2041, Bronx County, said point being 2,533.59 feet distant northwesterly along said easterly boundary from the point of intersection of the northerly boundary of Hutchinson River Parkway with said easterly boundary; running thence along said easterly boundary North 18 degrees 58 minutes 57.7 seconds West a distance of 99.80 feet to a point; thence still along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 20.18 feet to a point; thence North 71 degrees 01 minute 02 seconds East a distance of 219.91 feet to a point; thence North 3 degrees 11 minutes 40.8 seconds East a distance of 101.36 feet to a point; thence North 61 degrees 02 minutes 19.2 seconds West a distance of 38.28 feet to a point of curvature; thence along a curve bearing to the left, having a radius of 180.3 feet a distance of 97.55 feet to a point; thence South 87 degrees 57 minutes 40.8 seconds West a distance of 175.02 feet to a point on the easterly boundary of the New England Thruway; thence along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 891.66 feet to a point of curvature; running thence along said easterly boundary and along a curve bearing to the right, having a radius of 1,500 feet, a distance of 413.18 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right having a radius of 3,862 feet, a distance of 445.22 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right, having

SCHEDULE A-1 (Continued)

a radius of 9,862 feet, a distance of 652.73 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,862 feet a distance of 382.33 feet; thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,112 feet a distance of 457.18 feet to a point; thence still along said easterly boundary along a curve bearing to the right having a radius of 1,900 feet a distance of 391.28 feet to a point of tangency in the bed of former Wright Avenue; thence still along said easterly boundary North 34 degrees 55 minutes 50.4 seconds East a distance of 261.32 feet to a point; thence South 37 degrees 04 minutes 09.6 seconds East a distance of 338.59 feet to a point of curvature; thence along a curve bearing to the left having a radius of 600.0 feet, a distance of 796.25 feet to a point; thence North 66 degrees 53 minutes 40.8 seconds East a distance of 1406.93 feet to a point; thence North 14 degrees 31 minute 29 seconds East a distance of 662.90 feet to a point on the southerly side of Givan Avenue as vested in the City of New York on November 22, 1960 and on April 1, 1958; thence along said southerly side North 66 degrees 53 minutes 40.8 seconds East a distance of 44.93 feet to the westerly line of Conner Street as now laid out and vested in the City of New York; thence South 38 degrees 21 minutes 25.0 seconds East along the westerly side of Conner Street as now laid out and vested in the City of New York a distance of 210.62 feet to a point where the same is intersected by the westerly side of an Old Road; thence in a southerly direction and along the westerly side of said Old Road the following three courses and distances: (1) South 5 degrees 44 minutes 50 seconds East a distance of 146.80 feet; (2) South 11 degrees 08 minutes 00 seconds East a distance of 67.58 feet; and (3) South 4 degrees 09 minutes 30 seconds East a distance of 2.02 feet to a point; thence in an easterly direction across Old Road North 85 degrees 50 minutes 30 seconds East a distance of 10/13 feet to the westerly line of land acquired by the City of New York in the opening of "Public Place"; thence South 14 degrees 31 minutes 29 seconds West and along the said westerly line of the land so acquired a distance of 270.77 feet to the southerly line of the land so acquired; thence South 75 degrees 28 minutes 31.? seconds East and along the southerly line of the land so acquired a distance of 325.30 feet to its intersection with the United States Pierhead and Bulkhead Line of the Hutchinson River as approved by the Secretary of War on October 28, 1940, the coordinates of said point being 36019.585 North and 21426.443 West; thence in a generally southerly direction and along the said Pierhead and Bulkhead Line the following six courses and distances: (1) South 14 degrees 31 minutes 28.8 seconds West a distance of 400.902 feet; (2) South 17 degrees 14 minutes 17.8 seconds West a distance of 989.050 feet; (3) South 14 degrees 30 minutes 23.3 seconds West a distance of 382.151 feet to a point; (4) South 08 degrees 00 minutes 32.5 seconds West a distance of 611.408 feet to a

SCHEDULE A-1 (Continued)

point; (5) South 01 degrees 37 minutes 40.7 seconds East a distance of 1285.023 feet to a point; and (6) South 50 degrees 45 minutes 28.5 seconds East a distance of 562.737 feet to a point on the aforementioned northerly boundary of Hutchinson River Parkway; thence along said northerly boundary South 34 degrees 06 minutes 23.3 seconds West a distance of 145.00 feet to a point; thence North 74 degrees 23 minutes 37 seconds West a distance of 720.81 feet to a point of curvature; thence along a curve bearing to the left, having a radius of 2,587.6 feet, a distance of 1,561.85 feet to a point; thence South 71 degrees 01 minute 02 seconds West a distance of 352.16 feet to the point or place of BEGINNING.

EXHIBIT "10" - BUILDING LOAN AGREEMENT, DATED JULY 15, 1965 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE B

BORROWER'S AFFIDAVIT

Annexed to and being a part of a

Building Loan Agreement dated July 15, 1965,

between

RIVERBAY CORPORATION
(Borrower), and

NEW YORK STATE HOUSING FINANCE AGENCY (Lender)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

ABRAHAM E. KAZAN, being duly sworn, deposes and says:
I reside at 130 Gale Place, Bronx, New York
I am the President of RIVERBAY CORPORATION
the Borrower mentioned in the annexed Building Loan Agreement;

The consideration paid or to be paid, by the Borrower to the Lender for the loan described therein is the sum of $ 501,700; and that all other estimated expenses incurred or to be incurred in connection with said loan are as follows:

Examination and insurance of title and recording fees	$ 340,000
Attorneys Fees	$ 150,000
Fees of architects, engineers and surveyors	$ 3,800,000
Fees and charges of Lender	$ 2,509,000
Selling Expenses	$

The net sum available to the said Borrower for the improvement is Two Hundred Twenty-Nine Million Three Hundred Fifty-Four Thousand Nine Hundred Ten ($229,354,910) Dollars, less such amounts as may become due or payable for insurance premiums, interest on the Mortgage described in the annexed Building Loan Agreement, ground rents, taxes, assessments, water rents and sewer rents accruing during the making of the improvement, and less such amounts necessary to reimburse the said Borrower for payments made prior to the initial advance under this Building Loan Agreement, and to pay for those items of cost of said improvement, as defined in subdivision 5 of Section 2 of the Lien Law.

This statement is made pursuant to Section 22 of the Lien Law of the State of New York.

The reason this statement is made by deponent and not by the Borrower is that the Borrower is a corporation and deponent is an officer thereof.

The facts herein stated are true to the knowledge of deponent.

Abraham E. Kazan

Sworn to before me
this 15th
day of July,
1965.

ROY GAINSBURG
Notary Public, State of New York
No. 31-1397840
Qualified in New York County
Commission Expires March 30, 1967

MODIFICATION NUMBER ONE

OF

BUILDING LOAN AGREEMENT

AGREEMENT, dated as of the 17th day of March, 1967 between NEW YORK STATE HOUSING FINANCE AGENCY, an agency created pursuant to the provisions of the New York State Housing Finance Agency Act (hereinafter referred to as the "Lender") of 393 Seventh Avenue, Borough of Manhattan, City, County and State of New York and RIVERBAY CORPORATION, a corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having an office at 465 Grand Street, Borough of Manhattan, City and State of New York (hereinafter referred to as the "Borrower");

WHEREAS, the Lender and the Borrower entered into a Building Loan Agreement dated as of July 15, 1965, and filed in the Office of the County Clerk of Bronx County on July 16, 1965, which Building Loan Agreement is hereinafter referred to as the "Building Loan Agreement"; and

WHEREAS, under the Building Loan Agreement, the Lender agreed to loan to the Borrower the amount of Two Hundred Thirty-Six Million Six Hundred Fifty-Five Thousand Seven Hundred Ten ($236,655,710) Dollars; and

WHEREAS, in addition to the amount of Two Hundred Thirty-Six Million Six Hundred Fifty-Five Thousand Seven Hundred Ten ($236,655,710) Dollars agreed to be loaned by the Lender to the Borrower pursuant to the Building Loan Agreement, the Lender has agreed to lend to the Borrower the amount of Ten Million One Hundred Thousand ($10,100,000) Dollars pursuant to the Building Loan Agreement, so that the aggregate amount to be loaned by the Lender to the Borrower under the Building Loan Agreement shall be Two Hundred Forty-Six Million Seven Hundred Fifty-Five Thousand Seven Hundred Ten ($246,755,710) Dollars; and

WHEREAS, the Lender and the Borrower have agreed to further modify the Building Loan Agreement to provide for the aforesaid increase in this Mortgage Loan; and

WHEREAS, to provide for the issuance of Bonds in order to obtain from time to time monies with which to make Mortgage Loans, the Lender has adopted, on April 2, 1965, its Non-Profit Housing Project Bond Resolution, and proposes to adopt one or more resolutions authorizing the issuance of Notes for the same purpose; and

WHEREAS, the monies borrowed by the Lender through the issuance of Bonds and Notes for the purpose of paying interest on the Bonds and Notes issued by the Lender to obtain funds with which to make this loan to the Borrower shall constitute a part of, and be included in the computation of this Mortgage Loan;

NOW, THEREFORE, the parties agree:

1. The first paragraph of Article I of the Building Loan Agreement is hereby deleted and the following paragraph is hereby substituted therefor:

> "I. The Lender agrees to make, and the Borrower agrees to accept, a loan of Two Hundred Forty-Six Million Seven Hundred Fifty-Five Thousand Seven Hundred Ten ($246,755,710) Dollars, to be advanced as herein provided, and to be evidenced by the Borrower's notes, payable with interest and amortization as therein provided and secured by mortgages (hereinafter referred to as the "Mortgage") on the premises described in Schedule A."

2. The first paragraph of Article II of the Building Loan Agreement is hereby deleted and the following paragraph is substituted therefor:

> "II. The Borrower will construct on the premises the following described Project on or before August 1, 1970:
>
> Thirty-five fireproof apartment buildings, ten of which shall be 24 stories, ten of which shall be 26 stories and fifteen of which shall be 33 stories, and 236 two-family, 3-story town houses, containing an aggregate of 15,372 apartments, commercial buildings containing approximately 7,050,000 cubic feet, a community center, a power plant building and on-site parking facilities for 10,850 cars."

3. The fourth sentence of the first paragraph of Article III of the Building Loan Agreement is hereby deleted and the following sentence is substituted therefor:

> "However, at no time will any advance or payment be made by the Lender to the Borrower which would result in a loan in excess of eighty-eight and 80/100 per cent (88.8%) of the then "Project Cost", as defined and determined in accordance with the provisions of the Limited-Profit Housing Companies Law at the time of each such advance or payment."

4. Whenever in the Building Loan Agreement reference is made to the "Note" or "Mortgage" securing the Mortgage Loan executed by Borrower, such terms shall be deemed to apply and refer to the mortgage notes and mortgages, securing the loan made and to be made by the Lender pursuant to the Building Loan Agreement, as hereby amended.

5. Schedule B annexed hereto shall be and the same hereby is substituted for Schedule B heretofore annexed to the Building Loan Agreement.

6. Except as herein amended, the Building Loan Agreement shall remain in full force and effect and in the event of any inconsistency between the Building Loan Agreement and this Modification Number One of Building Loan Agreement, the provisions of this Modification Number One of Building Loan Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

ATTEST:

Secretary
Assistant Attorney

NEW YORK STATE HOUSING FINANCE AGENCY

By
Paul Belica, Executive Director

ATTEST:

Assistant Secretary

RIVERBAY CORPORATION

By
Harold Ostroff, President

APPROVED the 14th day of April, 1967.

Commissioner of Housing and Community Renewal of the State of New York.

By
Deputy Commissioner of Housing and Community Renewal of the State of New York

BEST COPY AVAILABLE

EXHIBIT "11" - MODIFICATION NO. 1 OF BUILDING LOAN AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 14th day of April, 1967, before me personally came PAUL BELICA, to me known, who, being by me duly sworn, did depose and say that he resides at No. 359 Cedar Drive, Briarcliff Manor, New York; that he is Executive Director of the New York State Housing Finance Agency, the Agency described in and which executed the foregoing instrument; that he knows the seal of said Agency; that the seal affixed to said instrument is the official seal of said Agency; that it was so affixed by order of the Members of said Agency, and that he signed his name thereto by like order.

Notary Public

ROY GAINSBURG
Notary Public, State of New York
No. 31-1357010
Qualified in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 14th day of April, 1967, before me personally came HAROLD OSTROFF, to me known, who, being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

Notary Public

ROY GAINSBURG
Notary Public, State of New York
No. 31-1357010
Qualified in New York County
Commission Expires March 30, 1969

EXHIBIT "11" - MODIFICATION NO. 1 OF BUILDING LOAN AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE A

PARCEL I

ALL that certain plot, piece or parcel of land situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

BEGINNING at the intersection of the easterly side of Hutchinson River Parkway Extension as legally opened July 19, 1941, with the westerly U.S. Pierhead and Bulkhead Line of the Hutchinson (Eastchester Creek) River, as approved by the Secretary of War October 28, 1940, having coordinates North 31,848.67 West 21,256.51; thence along said U. S. Pierhead and Bulkhead Line the following bearings and distances; South 50 degrees, 45 minutes 28.7 seconds East 123.589 feet; South 16 degrees 59 minutes 47.6 seconds East 615.405 feet; South 4 degrees 30 minutes 56.5 seconds East 706.572 feet and South 12 degrees 13 minutes 19.5 seconds West 460.965 feet; thence South 48 degrees 02 minutes 53 seconds East 331.061 feet to the southerly U. S. Pierhead and Bulkhead Line of Givans Creek as approved by the Secretary of War October 28, 1940; thence along the westerly U.S. Pierhead and Bulkhead Line of Hutchinson River, South 53 degrees 57 minutes 51.9 seconds East 5.010 feet to the northerly property line of land now or formerly of the New York, New Haven and Hartford Railroad Company; thence along said northerly property line of said railroad on a curve to the right having a radius of 2,192.50 feet, a distance of 370.27 feet; thence still along said northerly property line of said railroad South 39 degrees 41 minutes 21.4 seconds East a distanceof 20.00 feet; thence still along said northerly property line of said railroad on a curve to the right, having a radius of 2,507.3 feet a distance of 705.37 feet; thence still along said northerly property line of said railroad South 66 degrees 25 minutes 47 seconds West a distance of 404.07 feet to the prolongation southerly of the easterly side of Hunter Avenue (Lorillard Avenue) as laid out on Map of Pelham Park by C. J. Byrne, July 4, 1873, filed Westchester County September 20, 1873, as Map No. 599; thence northerly along said prolongation and along the easterly line of said Hunter Avenue as laid out on said map 559.32 feet to a point in the most southerly line of Lot 51 in Block 5135 on the Tax Map of the City of New York for the Borough of Bronx; thence westerly along said most southerly line of said tax lot 51 in Block 5135 a distance of 150.00 feet to the westerly line of said tax lot 51; thence northerly along said last mentioned line 150.00 feet to the southerly line of said tax lot 51; thence westerly along said last mentioned line 100.00 feet to the easterly side of Boller Avenue (Sea View Avenue) as shown on Map No. 599 above mentioned; thence northerly along said easterly side of

BEST COPY AVAILABLE

SCHEDULE A (Continued)

Boller Avenue 306.85 feet to the easterly or southeasterly side of Hutchinson River Parkway Extension; thence northeasterly along the southeasterly side of said Hutchinson River Parkway Extension as presently laid out the following four courses and distances: (1) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,102.34 feet; (2) North 66 degrees 58 minutes 06.6 seconds East a distance of 29.85 feet; (3) North 16 degrees 59 minutes 47 seconds West a distance of 20.81 feet; (4) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,291.32 feet to the point or place of BEGINNING.

PARCEL II

ALL that certain lot, piece or parcel of land situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly bounded and described as follows:

BEGINNING at a point on the easterly boundary of the New England Thruway as laid out on a map filed May 17, 1948, as Map No. 2041, Bronx County, said point being 2,533.59 feet distant northwesterly along said easterly boundary from the point of intersection of the northerly boundary of Hutchinson River Parkway with said easterly boundary; running thence along said easterly boundary North 16 degrees 58 minutes 57.7 seconds West a distance of 99.88 feet to a point; thence still along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 20.18 feet to a point; thence North 71 degrees 01 minute 02 seconds East a distance of 219.91 feet to a point; thence North 3 degrees 11 minutes 40.8 seconds East a distance of 101.36 feet to a point; thence North 61 degrees 02 minutes 19.2 seconds West a distance of 38.28 feet to a point of curvature; thence along a curve bearing to the left, having a radius of 180.3 feet a distance of 97.55 feet to a point; thence South 87 degrees 57 minutes 40.8 seconds West a distance of 175.02 feet to a point on the easterly boundary of the New England Thruway; thence along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 891.66 feet to a point of curvature; running thence along said easterly boundary and along a curve bearing to the right, having a radius of 1,500 feet, a distance of 413.18 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right having a radius of 3,862 feet, a distance of 445.22 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right, having

SCHEDULE A (Continued)

a radius of 9,862 feet, a distance of 652.73 feet to a point of compound curvature; thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,862 feet a distance of 382.33 feet; thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,112 feet a distance of 457.18 feet to a point; thence still along said easterly boundary along a curve bearing to the right having a radius of 1,900 feet a distance of 391.28 feet to a point of tangency in the bed of former Wright Avenue; thence still along said easterly boundary North 34 degrees 55 minutes 50.4 seconds East a distance of 261.32 feet to a point; thence South 37 degrees 04 minutes 09.6 seconds East a distance of 338.59 feet to a point of curvature; thence along a curve bearing to the left having a radius of 600.0 feet, a distance of 796.25 feet to a point; thence North 66 degrees 53 minutes 40.8 seconds East a distance of 1406.93 feet to a point; thence North 14 degrees 31 minute 29 seconds East a distance of 662.90 feet to a point on the southerly side of Givan Avenue as vested in the City of New York on November 22, 1960 and on April 1, 1958; thence along said southerly side North 66 degrees 53 minutes 40.8 seconds East a distance of 44.93 feet to the westerly line of Conner Street as now laid out and vested in the City of New York; thence South 38 degrees 21 minutes 25.0 seconds East along the westerly side of Conner Street as now laid out and vested in the City of New York a distance of 210.62 feet to a point where the same is intersected by the westerly side of an Old Road; thence in a southerly direction and along the westerly side of said Old Road the following three courses and distances: (1) South 5 degrees 44 minutes 50 seconds East a distance of 146.80 feet; (2) South 11 degrees 08 minutes 00 seconds East a distance of 67.58 feet; and (3) South 4 degrees 09 minutes 30 seconds East a distance of 2.02 feet to a point; thence in an easterly direction across Old Road North 85 degrees 50 minutes 30 seconds East a distance of 10/13 feet to the westerly line of land acquired by the City of New York in the opening of "Public Place"; thence South 14 degrees 31 minutes 29 seconds West and along the said westerly line of the land so acquired a distance of 270.77 feet to the southerly line of the land so acquired; thence South 75 degrees 28 minutes 31.2 seconds East and along the southerly line of the land so acquired a distance of 325.00 feet to its intersection with the United States Pierhead and Bulkhead Line of the Hutchinson River as approved by the Secretary of War on October 28, 1940, the coordinates of said point being 36019.585 North and 21426.448 West; thence in a generally southerly direction and along the said Pierhead and Bulkhead Line the following six courses and distances: (1) South 14 degrees 31 minutes 28.8 seconds West a distance of 400.902 feet; (2) South 17 degrees 14 minutes 17.8 seconds West a distance of 989.050 feet; (3) South 14 degrees 30 minutes 23.3 seconds West a distance of 382.151 feet to a point; (4) South 08 degrees 00 minutes 32.5 seconds West a distance of 611.408 feet to a

SCHEDULE A (Continued)

point; (5) South 01 degrees 37 minutes 40.7 seconds East a distance of 1285.023 feet to a point; and (6) South 50 degrees 45 minutes 28.5 seconds East a distance of 562.737 feet to a point on the aforementioned northerly boundary of Hutchinson River Parkway; thence along said northerly boundary South 34 degrees 06 minutes 23.3 seconds West a distance of 145.00 feet to a point; thence North 74 degrees 23 minutes 37 seconds West a distance of 720.81 feet to a point of curvature; thence along a curve bearing to the left, having a radius of 2,587.6 feet, a distance of 1,561.85 feet to a point; thence South 71 degrees 01 minute 02 seconds West a distance of 352.16 feet to the point or place of BEGINNING.

SCHEDULE B

BORROWER'S AFFIDAVIT

As Amended By

Modification Number One of Building Loan Agreement dated [illegible], 1967

between

RIVERBAY CORPORATION

and

NEW YORK STATE HOUSING FINANCE AGENCY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HAROLD OSTROFF, being duly sworn, deposes and says:

I reside at 3915 Orloff Avenue, Bronx, New York; I am the President of Riverbay Corporation, the Borrower mentioned in the foregoing Building Loan Agreement;

The consideration paid or to be paid, by said Riverbay Corporation for the loan described therein is the sum of Five Hundred Twenty-two Thousand ($522,000) Dollars; and that all other expenses incurred or to be incurred in connection with said loan are as follows:

Examination of title and recording fees ... $353,000.00
Attorneys fees 150,000.00
Fees of Architects, Engineers & Surveyors..4,100,000.00
Supervising Governmental Agency fee 2,610,000.00

The net sum available to the said Borrower for the improvement is Two Hundred Thirty-Nine Million Twenty Thousand Seven Hundred Ten

($239,020,710) Dollars, less such amounts as may become due or payable for insurance premiums, interest on building loan mortgage, ground rents, taxes, assessments, water rents and sewer rents accruing during the making of the improvement, and less such amounts necessary to reimburse the said Borrower for payments made prior to the initial advance under this Building Loan Agreement, and to pay for those items of cost of said improvement, as defined in subdivision 5 of Section 2 of the Lien Law.

This statement is made pursuant to Section 22 of the Lien Law of the State of New York.

The reason this statement is made by deponent and not by the Borrower is that the Borrower is a corporation and deponent is an officer thereof.

The facts herein stated are true to the knowledge of deponent.

Harold Ostroff

Sworn to before me this
14th day of April, 1967.

ROY GINSBURG
Notary Public, State of New York
No. 31-1400710
Certified in New York County
Commission Expires March 30, 1969

MODIFICATION NUMBER TWO

OF

BUILDING LOAN AGREEMENT

AGREEMENT, dated as of the 3rd day of February, 1969, between NEW YORK STATE HOUSING FINANCE AGENCY, an agency created pursuant to the provisions of the New York State Housing Finance Agency Act, of 393 Seventh Avenue, Borough of Manhattan, City, County and State of New York (hereinafter referred to as the "Lender"), and RIVERBAY CORPORATION, a corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having an office at 465 Grand Street, Borough of Manhattan, City and State of New York (hereinafter referred to as the "Borrower");

WHEREAS, to provide for the issuance of Bonds in order to obtain from time to time monies with which to make Mortgage Loans, the Lender has adopted, on April 2, 1965, its Non-Profit Housing Project Bond Resolution (hereinafter referred to as the "Resolution") and proposes to adopt one or more resolutions authorizing the issuance of Notes for the same purpose; and

WHEREAS, the monies borrowed by the Lender through the issuance of Bonds and Notes for the purpose of paying interest on the Bonds and Notes issued by the Lender to obtain funds with

which to make this loan to the Borrower shall constitute a part of, and be included in the computation of this Mortgage Loan; and

WHEREAS, the Lender and the Borrower entered into a Building Loan Agreement dated as of July 15, 1965, and filed in the Office of the County Clerk of Bronx County on July 16, 1965, as amended by Modification Number One of Building Loan Agreement dated as of April 14, 1967 and filed in the Office of the County Clerk of Bronx County on April 18, 1967, which Building Loan Agreement as so amended is hereinafter referred to as the "Building Loan Agreement"; and

WHEREAS, under the Building Loan Agreement the Lender agreed to loan to the Borrower the amount of Two Hundred Forty-six Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($246,755,710) Dollars; and

WHEREAS, pursuant to an agreement dated December 16, 1968 (hereinafter referred to as the "School Agreement") between The City of New York, the Board of Education of The City of New York (hereinafter referred to as the "Board"), and the Borrower, the Borrower has agreed to construct certain schools and appurtenant facilities as part of the project acquired and being constructed and developed by the Borrower; and

WHEREAS, in addition to the amount of Two Hundred Forty-six Million Seven Hundred Fifty-five Thousand Seven Hundred Ten

($246,755,710) Dollars agreed to be loaned by the Lender to the Borrower pursuant to the Building Loan Agreement, the Lender has agreed to lend to the Borrower for the purposes of the School Agreement, as authorized by Article IX, Section 920, of the Resolution, the amount of Forty-six Million ($46,000,000) Dollars pursuant to the Building Loan Agreement, so that the aggregate amount to be loaned by the Lender to the Borrower under the Building Loan Agreement shall be Two Hundred Ninety-two Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($292,755,710) Dollars; and

WHEREAS, the Lender and the Borrower have agreed to further modify the Building Loan Agreement to provide for the aforesaid increase in this Mortgage Loan;

NOW, THEREFORE, the parties agree:

1. The first paragraph of Article I of the Building Loan Agreement is hereby deleted and the following paragraph is hereby substituted therefor:

> "I. The Lender agrees to make, and the Borrower agrees to accept, a loan of Two Hundred Ninety-two Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($292,755,710) Dollars to be advanced as herein provided, and to be evidenced by the Borrower's notes, payable with interest and amortization as therein provided and secured by mortgages (hereinafter referred to as the "Mortgage") on the premises described in Schedule A."

2. The first paragraph of Article II of the Building Loan Agreement is hereby deleted and the following paragraph is substituted therefor:

"II. The Borrower will construct on the premises the following described project:

On or before August 1, 1970, thirty-five fireproof apartment buildings, ten of which shall be 24 stories, ten of which shall be 26 stories and fifteen of which shall be 33 stories, and 236 two-family, 3-story town houses, containing an aggregate of 15,372 apartments, commercial buildings containing approximately 7,050,000 cubic feet, a community center, a power plant building, on-site parking facilities for 10,850 cars; on or before July 1, 1972, an educational park consisting of two primary school units, two intermediate school units, one high school and central facilities unit and gymnasia, together with the facilities related thereto."

3. Article III of the Building Loan Agreement is hereby deleted and the following Article III is hereby substituted therefor:

"III. Said loan shall be advanced at such times and in such amounts as the Lender shall determine, subject to the certification in writing from the Commissioner, that such advance is then payable and due under and in accordance with the terms and conditions of this agreement and either of two certain construction contracts approved by the Commissioner, less such holdback on advances as provided in said construction contracts; except that in the case of advances for the purposes of the School Agreement, in the event that the Board or the Comptroller of the City of New York (hereinafter referred to as the "Comptroller") delivers to the Borrower and the Commissioner a written objection to any specific item included in any such advance as not being proper under the terms of this Building Loan Agreement or the applicable construction contract, setting forth the grounds for such objection, such item shall continue to be included in the first such advance (under this Building Loan Agreement) next ensuing after the delivery of such objection, but, unless such item shall be corrected by the Borrower to the satisfaction of the Board, the Comptroller, the Commissioner and the Lender prior to the time of making of the second such advance (under this Building Loan Agreement) next ensuing after the delivery of such objection, then an appropriate amount covering such item shall be withheld from such second advance

next ensuing and such amount withheld shall not be disbursed to the Borrower until such item is so corrected. At any time after 50% of the construction has been completed for any stage of construction determined in accordance with Article II hereof, if the Borrower and the Commissioner agree, advances may be made for the construction completed after such agreement for such stage of construction without making any holdback at the time of such agreement and the amount of holdback applicable when 50% of the construction for such stage of construction was completed. After the Commissioner has determined that any such stage of construction has been substantially completed, the remaining holdback for such stage of construction may be paid from time to time and in such amounts as the Commissioner shall approve. However, at no time will any advance or payment be made by the Lender to the Borrower which would result in a loan in excess of ninety and 35/100 per cent (90.35%) of the then "Project Cost", as defined and determined in accordance with the provisions of the Limited-Profit Housing Companies Law at the time of each such advance or payment. As part of the consideration to the Lender hereunder, the Lender shall have the right, if the Lender believes it advisable so to do, to make any given advance of mortgage proceeds when the Borrower shall be entitled to same in accordance with the terms of this agreement, notwithstanding that the Borrower shall not have requested such advance or shall have refused to accept same, and all such advances shall be deemed to have been made in pursuance of this agreement and not to be in contravention or in modification thereof."

4. The first sentence of Article XVIII of the Building Loan Agreement is hereby deleted and the following sentence is substituted therefor:

"XVIII. If the Borrower at any time prior to the completion of the Project abandons the same or ceases work thereon or fails to complete the Project strictly in accordance with the plans and specifications, except as to changes approved by the Commissioner and except as provided in the School Agreement, or makes changes in the plans and specifications without first securing written approval of the Commissioner or otherwise fails

to comply with the terms hereof, then the Lender, at its option, may forthwith enter into possession of the premises and perform any and all work and labor necessary to complete the Project substantially in accordance with the plans and specifications and employ watchmen to protect the premises and the Project under construction from injury; all sums so expended by the Lender shall be deemed to have been paid to the Borrower and secured by the Mortgage."

5. The first sentence of Article XIX of the Building Loan Agreement is hereby deleted and the following sentence is substituted therefor:

"XIX. The Borrower shall furnish or cause to be furnished such performance and payment bonds as the Commissioner and the Lender shall require and as are required under the School Agreement."

6. Whenever in the Building Loan Agreement reference is made to the "Note" or "Mortgage" securing the Mortgage Loan executed by Borrower, such terms shall be deemed to apply and refer to the mortgage notes and mortgages, securing the loan made and to be made by the Lender pursuant to the Building Loan Agreement, as hereby amended.

7. Schedule A annexed hereto shall be and the same hereby is substituted for Schedule A heretofore annexed to the Building Loan Agreement.

8. Schedule B annexed hereto shall be and the same hereby is substituted for Schedule B heretofore annexed to the Building Loan Agreement.

9. Except as herein amended, the Building Loan Agreement shall remain in full force and effect and in the event of any inconsistency between the Building Loan Agreement and this

Modification Number Two of Building Loan Agreement, the provisions of this Modification Number Two of Building Loan Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

NEW YORK STATE HOUSING FINANCE AGENCY

[Corporate Seal]

By _____
Paul Belica, Executive Director

Attest:

_____

RIVERBAY CORPORATION

[Corporate Seal]

By _____
Harold Ostroff, President

Attest:

_____
President Secretary

APPROVED the 3rd day of February, 1969

_____
Commissioner of Housing and Community Renewal of the State of New York

BEST COPY AVAILABLE

ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 3rd day of February, 1969, before me personally came PAUL BELICA, to me known, who, being by me duly sworn, did depose and say that he resides at No. 359 Cedar Drive, Briarcliff Manor, New York; that he is Executive Director of the New York State Housing Finance Agency, the Agency described in and which executed the foregoing instrument; that he knows the seal of said Agency; that the seal affixed to said instrument is the official seal of said Agency; that it was so affixed by order of the Members of said Agency, and that he signed his name thereto by like order.

Richard H. Greene
Notary Public

RICHARD H. GREENE
Notary Public, State of New York
No. 31-1557428
Qualified in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 3rd day of February, 1969, before me personally came HAROLD OSTROFF, to me known, who, being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

Richard H. Greene
Notary Public

RICHARD H. GREENE
Notary Public, State of New York
No. 31-1557428
Qualified in New York County
Commission Expires March 30, 1969

EXHIBIT "12" - MODIFICATION NO. 2 OF BUILDING LOAN AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE A

PARCEL A:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

BEGINNING at the intersection of the easterly side of Hutchinson River Parkway Extension as legally opened July 19, 1941, with the westerly U. S. Pierhead and Bulkhead Line of the Hutchinson (Eastchester Creek) River, as approved by the Secretary of War October 28, 1940, having coordinates North 31,848.67 West 21,256.51;
thence along said U. S. Pierhead and Bulkhead Line the following bearings and distances: South 50 degrees 45 minutes 28.7 seconds East 123.589 feet; South 16 degrees 59 minutes 47.6 seconds East 615.405 feet; South 4 degrees 30 minutes 56.5 seconds East 706.572 feet and South 12 degrees 13 minutes 19.5 seconds West 460.965 feet;
thence South 48 degrees 02 minutes 53 seconds East 331.061 feet to the southerly U. S. Pierhead and Bulkhead Line of Givons Creek as approved by the Secretary of War October 28, 1940;
thence along the westerly U. S. Pierhead and Bulkhead Line of Hutchinson River, South 53 degrees 57 minutes 51.9 seconds East 5.010 feet to the northerly property line of land now or formerly of the New York, New Haven and Hartford Railroad Company;
thence along said northerly property line of said railroad on a curve to the right having a radius of 2,192.50 feet, a distance of 370.27 feet;
thence still along said northerly property line of said railroad South 39 degrees 41 minutes 21.4 seconds East a distance of 20.00 feet;
thence still along said northerly property line of said railroad on a curve to the right, having a radius of 2,507.3 feet a distance of 705.37 feet;
thence still along said northerly property line of said railroad South 66 degrees 25 minutes 47 seconds West a distance of 404.07 feet to the prolongation southerly of the easterly side of Hunter Avenue (Lorillard Avenue) as laid out on Map of Pelham Park by C. J. Byrne, July 4, 1873, filed Westchester County September 20, 1873, as Map No. 599;
thence northerly along said prolongation and along the easterly line of said Hunter Avenue as laid out on said map 559.32 feet to a point in the most southerly line of Lot 51 in Block 5135 on the Tax Map of the City of New York for the Borough of Bronx;
thence westerly along said most southerly line of said tax lot 51 in Block 5135 a distance of 150.00 feet to the westerly line of said tax lot 51;
thence northerly along said last mentioned line 150.00 feet to the southerly line of said tax lot 51;
thence westerly along said last mentioned line 100.00 feet to the easterly side of Boller Avenue (Sea View Avenue) as shown on Map No. 599 above mentioned;
thence northerly along said easterly side of Boller Avenue 306.85 feet to the easterly or southeasterly side of Hutchinson River Parkway Extension;

BEST COPY AVAILABLE

SCHEDULE A (Continued)

PARCEL A (Continued)

thence northeasterly along the southeasterly side of said Hutchinson River Parkway Extension as presently laid out the following four courses and distances: (1) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,102.34 feet; (2) North 66 degrees 58 minutes 06.6 seconds East a distance 29.85 feet; (3) North 16 degrees 59 minutes 47 seconds West a distance of 20.81 feet; (4) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,291.32 feet to the point or place of BEGINNING.

PARCEL B:

ALL that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly bounded and described as follows:

BEGINNING at a point on the easterly boundary of the New England Thruway as laid out on a map filed May 17, 1948, as Map No. 2041, Bronx County, said point being 2,533.59 feet distant northwesterly along said easterly boundary from the point of intersection of the northerly boundary of Hutchinson River Parkway with said easterly boundary; running thence along said easterly boundary North 18 degrees 58 minutes 57.7 seconds West a distance of 99.88 feet to a point; thence still along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 20.18 feet to a point; thence North 71 degrees 01 minute 02 seconds East a distance of 219.91 feet to a point;
thence North 3 degrees 11 minutes 40.8 seconds East a distance of 101.36 feet to a point;
thence North 61 degrees 02 minutes 19.2 seconds West a distance of 38.28 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 130.3 feet a distance of 97.55 feet to a point;
thence South 87 degrees 57 minutes 40.8 seconds West a distance of 175.02 feet to a point on the easterly boundary of the New England Thruway;
thence along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 891.66 feet to a point of curvature; running
thence along said easterly boundary and along a curve bearing to the right, having a radius of 1,500 feet, a distance of 413.18 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 3,862 feet, a distance of 445.22 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right, having a radius of 9,862 feet, a distance of 6[illegible].73 feet to a point of compound curvature;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,862 feet a distance of 382.33 feet;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,112 feet a distance of 457.18 feet to a point;
thence still along said easterly boundary along a curve bearing to the right having a radius of 1,900 feet a distance of 391.28 feet to a point of tangency in the bed of former Wright Avenue;
thence still along said easterly boundary North 34 degrees 55 minutes 50.4 seconds East a distance of 261.32 feet to a point;
thence South 37 degrees 04 minutes 09.6 seconds East a distance of 338.59 feet to a point of curvature;
thence along a curve bearing to the left having a radius of 600.0 feet, a distance of 796.25 feet to a point;
thence North 66 degrees 53 minutes 40.8 seconds East a distance of 1406.93 feet to a point;
thence North 14 degrees 31 minutes 29 seconds East a distance of 662.90 feet to a point on the southerly side of Givan Avenue as vested in the City of New York on November 22, 1960 and on April 1, 1958;
thence along said southerly side North 66 degrees 53 minutes 40.8 seconds East a distance of 44.93 feet to the westerly line of Conner Street as now laid out and vested in the City of New York;
thence South 33 degrees 21 minutes 25.0 seconds East along the westerly side of Conner Street as now laid out and vested in the City of New York a distance of 210.62 feet to a point where the same is intersected by the westerly side of an Old Road;
thence in a southerly direction and along the westerly side of said Old Road the following three courses and distances:
(1) South 5 degrees 44 minutes 50 seconds East a distance of 146.80 feet;
(2) South 11 degrees 08 minutes 00 seconds East a distance of 67.58 feet; and
(3) South 4 degrees 09 minutes 30 seconds East a distance of 2.02 feet to a point;
thence in an easterly direction across Old Road North 85 degrees 50 minutes 30 seconds East a distance of 10.13 feet to the westerly line of land acquired by the City of New York in the opening of "Public Place";
thence South 14 degrees 31 minutes 29 seconds West and along the said westerly line of the land so acquired a distance of 270.77 feet to the southerly line of the land so acquired;
thence South 75 degrees 28 minutes 31.2 seconds East and along the southerly line of the land so acquired a distance of 325.00 feet to its intersection with the United States Pierhead and Bulkhead Line of the Hutchinson River as approved by the Secretary of War on October 28, 1940, the coordinates of said point being 36019.585 North and 21426.448 West;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence in a generally southerly direction and along the said Pierhead and Bulkhead Line the following six courses and distances:
(1) South 14 degrees 31 minutes 28.8 seconds West a distance of 400.902 feet;
(2) South 17 degrees 14 minutes 17.8 seconds West a distance of 989.050 feet;
(3) South 14 degrees 30 minutes 23.3 seconds West a distance of 382.151 feet to a point;
(4) South 08 degrees 00 minutes 32.5 seconds West a distance of 611.408 feet to a point;
(5) South 01 degrees 37 minutes 40.7 seconds East a distance of 1285.023 feet to a point; and
(6) South 50 degrees 45 minutes 28.5 seconds East a distance of 562.737 feet to a point on the aforementioned northerly boundary of Hutchinson River Parkway;
thence along said northerly boundary South 34 degrees 06 minutes 23.3 seconds West a distance of 145.00 feet to a point;
thence North 74 degrees 23 minutes 37 seconds West a distance of 720.81 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 2,587.6 feet, a distance of 1,561.85 feet to a point;
thence South 71 degrees 01 minute 02 seconds West a distance of 352.16 feet to the point or place of BEGINNING.

EXCEPT so much of the above described premises as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 214 and described as follows:

BEGINNING at the southwesterly corner of Givan Avenue and Conner Street as shown on plan No. 11791, adopted by Board of Estimate on 12/22/66 (Cal. #117) the coordinates of said corner being North 36,742.042 and West 21,841.855;

thence bearing along the southerly boundary of Givan Avenue bearing South 66 degrees 53 minutes 40.8 seconds West for a distance of 44.93 feet;
thence turning left an angle bearing South 14 degrees 31 minutes 29 seconds West for a distance of 99.4479 feet in the westerly side of Peartree Avenue; this point being the place of beginning for the description of this
thence turning left along the westerly boundary of Peartree Avenue an angle bearing South 23 degrees 06 minutes 19.2 seconds East for a distance of 50.1053 feet;
thence turning right along the westerly boundary of Peartree Avenue an angle bearing South 9 degrees 30 minutes 00 seconds West for a distance of 479.932 feet;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence along a curve bearing to the right having a radius of 12.0 feet for a distance of 18.461 feet the said curve having a center angle of 88 degrees 08 minutes 34 seconds to a point; this point being on the northerly boundary of Co-op City Blvd.;
thence continuing along the northerly boundary of Co-op City Blvd. along a curve bearing to the left having a radius of 370.0 feet for a distance of 63.5310 feet the said curve having a chord of 63.4528 feet;
thence turning right an angle bearing North 14 degrees 31 minutes 29 seconds East for a distance of 543.7111 feet to point of BEGINNING.

And EXCEPT so much of the above described premises (Parcel B) as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 217 and described as follows (2 parcels):

PARCEL I: Starting at the northeast corner of Bartow Avenue and Baychester Avenue as shown on Plan No. 11791; adopted by Board of Estimate on 12/22/66 (Cal. #117) coordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the northerly boundary of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East for a distance of 210.91 feet to a point; this point being point of beginning for the description of this Parcel;
thence turning left an angle bearing North 3 degrees 11 minutes 40.8 seconds East for a distance of 101.36 feet;
thence turning left an angle bearing North 61 degrees 02 minutes 19.2 seconds West for a distance of 38.28 feet to a point; this point being a point of tangency;
thence turning left along a curve of a radius of 180.3 feet for a distance of 97.5522 feet to a point; this point being a point of tangency;
thence continuing bearing South 87 degrees 57 minutes 40.8 seconds West for a distance of 10.3657 feet;
thence turning right an angle bearing North 71 degrees 01 minute 02.3 seconds East for a distance of 137.3151 feet;
thence turning right a 90 degree angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 177.0 feet to the northerly side of Bartow Avenue;
thence along same turning right a 90 degree angle bearing South 71 degrees 01 minute 02.3 seconds West 58.695 feet to beginning.

SCHEDULE A (Continued)

PARCEL I (Continued)

PARCEL II: BEGINNING at the northerly end of a curve connecting the northerly side of Bartow Avenue with the westerly side of Asch Loop as shown on Plan #11791, adopted by Board of Estimate on 12/22/66;
thence bearing along the westerly side of Asch Loop North 18 degrees 58 minutes 57.7 seconds West a distance of 165 feet;
thence South 71 degrees 01 minute 02.3 seconds West 15 feet;
thence South 18 degrees 58 minutes 57.7 seconds East 177 feet to northerly side of Bartow Avenue;
thence easterly along the northerly side of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East 3.0 feet to a point of curve;
thence along a curve to the left having a radius of 12.0 feet, 18.85 feet to beginning.

Together with and subject to the easements as defined and limited in deed recorded in Rec. L. 295 pg 217.

PARCEL C:

All that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

STARTING at the northeast corner of Bartow Avenue and Baychester Avenue, as shown on Plan No. 11791, adopted by the Board of Estimate, City of New York, on December 22, 1966, (Calendar No. 117) the Co-ordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the easterly boundary of Baychester Avenue Bearing North 23 degrees 06 minutes 19.2 seconds West for a distance of 145.00 feet to a point; this point being the point of beginning for the description of this parcel;
thence continuing along the easterly boundary of Baychester Avenue North 23 degrees 06 minutes 19.2 seconds West for a distance of 80.57 feet to a point;
thence turning right an angle bearing North 87 degrees 57 minutes 40.8 seconds East for a distance of 164.6543 feet to a point;
thence turning right an angle bearing South 71 degrees 01 minute 02.3 seconds West for a distance of 1.2899 feet to a point;
thence turning left an angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 39.1996 feet to a point;
thence turning right an angle bearing South 72 degrees 36 minutes 53.4 seconds West for a distance of 150.5791 feet to the point or place of BEGINNING,

SCHEDULE A (Continued)

PARCEL C (Continued)

which latter parcel was conveyed to Riverbay Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 210.

Except so much of the above described premises (Parcels A and B) as was conveyed by cession deed (Streets) by Riverbay Corporation to The City of New York recorded 12/29/67 in Record Liber 304 pg 324.

Together with the buildings and improvements thereon erected, and together with all the right, title and interest of the Borrower, if any, of, in and to beds of the streets, roads and avenues, and any easements over property, in front of and adjoining the above-described premises;

Together with any and all structures, buildings and improvements and replacements thereof and additions thereto, now or at any time hereafter constructed, erected, installed or placed in or upon the above-described real estate and any and all fixtures, fittings, appliances, apparatus, equipment, machinery, chattels and articles of personal property, including but not limited to steam and hot water boilers, pipes, radiators, bath-tubs, water-closets, refrigerators, gas and electrical fixtures, ranges and replacements thereof, now or at any time hereafter affixed to, attached to, placed upon or used or stored on or off the site or in any way connected with the complete and comfortable use, enjoyment, occupancy or operation of the plant of the said mortgaged premises (excepting only removable trade fixtures and other personal effects owned or possessed by the tenants who may occupy the mortgaged premises).

SCHEDULE B

BORROWER'S AFFIDAVIT

As Amended By

Modification Number Two of Building Loan Agreement dated February 3 , 1969

between

RIVERBAY CORPORATION

and

NEW YORK STATE HOUSING FINANCE AGENCY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HAROLD OSTROFF, being duly sworn, deposes and says:

I reside at 3915 Orloff Avenue, Bronx, New York; I am the President of Riverbay Corporation, the Borrower mentioned in the foregoing Building Loan Agreement;

The consideration paid or to be paid, by said Riverbay Corporation for the loan described therein is the sum of Nine Hundred Twenty-one Thousand ($921,000) Dollars; and that all other expenses incurred or to be incurred in connection with said loan are as follows:

Examination of title and recording fees	$448,000.00
Attorneys fees	212,500.00
Fees of Architects, Engineers & Surveyors	4,200,000.00
Supervising Governmental Agency Fee	2,136,000.00

The net sum available to the said Borrower for the improvement is Two Hundred Eighty-four Million Eight Hundred Thirty-eight Thousand

Two Hundred Ten ($284,838,210) Dollars, of which One Hundred Nine Million Four Hundred Seventy Thousand Six Hundred Eighty-four ($109,470,684) Dollars was heretofore advanced, leaving a balance of One Hundred Seventy-five Million Three Hundred Sixty-seven Thousand Five Hundred Twenty-six ($175,367,526) Dollars, less such amounts as may become due or payable for insurance premiums, interest on building loan mortgage, ground rents, taxes, assessments, water rents and sewer rents accruing during the making of the improvement, and less such amounts necessary to reimburse the said Borrower for payments made prior to the initial advance under this Building Loan Agreement, and to pay for those items of cost of said improvement, as defined in subdivision 5 of Section 2 of the Lien Law.

This statement is made pursuant to Section 22 of the Lien Law of the State of New York.

The reason this statement is made by deponent and not by the Borrower is that the Borrower is a corporation and deponent is an officer thereof.

The facts herein stated are true to the knowldge of deponent.

Harold Ostroff

Sworn to before me this
3rd day of February, 1969.

Richard H. Greene

RICHARD H. GREENE
Notary Public, State of New York
No. 31-1557425
Qualified in New York County
Commission Expires March 30, 1969

EXHIBIT "13" - MODIFICATION NO. 3 OF BUILDING LOAN AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER THREE

OF

BUILDING LOAN AGREEMENT

AGREEMENT, dated as of the 9th day of October, 1969, between NEW YORK STATE HOUSING FINANCE AGENCY, an agency created pursuant to the provisions of the New York State Housing Finance Agency Act, of 1250 Broadway, Borough of Manhattan, City, County and State of New York (hereinafter referred to as the "Lender"), and RIVERBAY CORPORATION, a corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having an office at 465 Grand Street, Borough of Manhattan, City and State of New York (hereinafter referred to as the "Borrower");

WHEREAS, to provide for the issuance of Bonds in order to obtain from time to time monies with which to make Mortgage Loans, the Lender has adopted, on April 2, 1965, its Non-Profit Housing Project Bond Resolution (hereinafter referred to as the "Resolution") and proposes to adopt one or more resolutions authorizing the issuance of Notes for the same purpose; and

WHEREAS, the monies borrowed by the Lender through the issuance of Bonds and Notes for the purpose of paying interest on the Bonds and Notes issued by the Lender to obtain funds with which to make this loan to the Borrower shall constitute a part of, and be included in the computation of this Mortgage Loan; and

EXHIBIT "13" - MODIFICATION NO. 3 OF BUILDING LOAN AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

WHEREAS, the Lender and the Borrower entered into a Building Loan Agreement dated as of July 15, 1965, and filed in the Office of the County Clerk of Bronx County on July 16, 1965, as amended by Modification Number One of Building Loan Agreement dated as of April 14, 1967 and filed in the Office of the County Clerk of Bronx County on April 18, 1967, and as further amended by Modification Number Two of Building Loan Agreement and filed in the Office of the County Clerk of Bronx County on February 4, 1969, which Building Loan Agreement as so amended is hereinafter referred to as the "Building Loan Agreement"; and

WHEREAS, under the Building Loan Agreement the Lender agreed to loan to the Borrower the amount of Two Hundred Ninety-two Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($292,755,710) Dollars; and

WHEREAS, in addition to the amount of Two Hundred Ninety-two Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($292,755,710) Dollars agreed to be loaned by the Lender to the Borrower pursuant to the Building Loan Agreement, the Lender has agreed to lend to the Borrower the amount of Sixty-nine Million ($69,000,000) Dollars pursuant to the Building Loan Agreement, so that the aggregate amount to be loaned by the Lender to the Borrower under the Building Loan Agreement shall be Three Hundred Sixty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($361,755,710) Dollars; and

WHEREAS, the Lender and the Borrower have agreed to further modify the Building Loan Agreement to provide for the aforesaid increase in this Mortgage Loan;

NOW, THEREFORE, the parties agree:

1. The first paragraph of Article I of the Building Loan Agreement is hereby deleted and the following paragraph is hereby substituted therefor:

> "I. The Lender agrees to make, and the Borrower agrees to accept, a loan of Three Hundred Sixty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($361,755,710) Dollars to be advanced as herein provided, and to be evidenced by the Borrower's notes, payable with interest and amortization as therein provided and secured by mortgages (hereinafter referred to as the "Mortgage") on the premises described in Schedule A."

2. The Fourth sentence of the first paragraph of Article III of the Building Loan Agreement is hereby deleted and the following sentence is hereby substituted therefor:

> "However, at no time will any advance or payment be made by the Lender to the Borrower which would result in a loan in excess of ninety-two and 00/100 per cent (92.00%) of the then "Project Cost", as defined and determined in accordance with the provisions of the Limited-Profit Housing Companies Law at the time of each such advance or payment."

3. Whenever in the Building Loan Agreement reference is made to the "Note" or "Mortgage" securing the Mortgage Loan executed by Borrower, such terms shall be deemed to apply and refer to the mortgage notes and mortgages, securing the loan made and to be made by the Lender pursuant to the Building Loan Agreement, as hereby amended.

4. Schedule A annexed hereto shall be and the same hereby is substituted for Schedule A heretofore annexed to the Building Loan Agreement.

5. Schedule B annexed hereto shall be and the same hereby is substituted for Schedule B heretofore annexed to the Building Loan Agreement.

6. Except as herein amended, the Building Loan Agreement shall remain in full force and effect and in the event of any inconsistency between the Building Loan Agreement and this Modification Number Three of Building Loan Agreement, the provisions of this Modification Number Three of Building Loan Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

[Corporate Seal]

Attest: _____

NEW YORK STATE HOUSING FINANCE AGENCY

By _____
Paul Belica, Executive Director

[Corporate Seal]

Attest: _____
Assistant Secretary

RIVERDAY CORPORATION

By _____
Harold Ostroff, President

APPROVED the 27th day of October, 1969

_____
Commissioner of Housing and Community Renewal of the State of New York

Apply

BEST COPY AVAILABLE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 9th day of October , 1969, before me personally came PAUL BELICA, to me known, who, being by me duly sworn, did depose and say that he resides at No. 359 Cedar Drive, Briarcliff Manor, New York; that he is Executive Director of the New York State Housing Finance Agency, the Agency described in and which executed the foregoing instrument; that he knows the seal of said Agency; that the seal affixed to said instrument is the official seal of said Agency; that it was so affixed by order of the Members of said Agency, and that he signed his name thereto by like order.

EZRA N. GOODMAN
Notary Public, State of New York
No. 24-6390960
Qualified in Kings County
Commission Expires March 30, 1970

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 9th day of October , 1969, before me personally came HAROLD OSTROFF, to me known, who, being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERDAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

EZRA N. GOODMAN
Notary Public, State of New York
No. 24-6390960
Qualified in Kings County
Commission Expires March 30, 1970

SCHEDULE A

PARCEL A:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

BEGINNING at the intersection of the easterly side of Hutchinson River Parkway Extension as legally opened July 19, 1941, with the westerly U. S. Pierhead and Bulkhead Line of the Hutchinson (Eastchester Creek) River, as approved by the Secretary of War October 28, 1940, having coordinates North 31,848.67 West 21,256.51;
thence along said U. S. Pierhead and Bulkhead Line the following bearings and distances: South 50 degrees 45 minutes 28.7 seconds East 123.589 feet; South 16 degrees 59 minutes 47.6 seconds East 615.405 feet; South 4 degrees 30 minutes 56.5 seconds East 706.572 feet and South 12 degrees 13 minutes 19.5 seconds West 460.965 feet;
thence South 48 degrees 02 minutes 53 seconds East 331.061 feet to the southerly U. S. Pierhead and Bulkhead Line of Givans Creek as approved by the Secretary of War October 28, 1940;
thence along the westerly U. S. Pierhead and Bulkhead Line of Hutchinson River, South 53 degrees 57 minutes 51.9 seconds East 5.010 feet to the northerly property line of land now or formerly of the New York, New Haven and Hartford Railroad Company;
thence along said northerly property line of said railroad on a curve to the right having a radius of 2,192.50 feet, a distance of 370.27 feet;
thence still along said northerly property line of said railroad South 39 degrees 41 minutes 21.4 seconds East a distance of 20.00 feet;
thence still along said northerly property line of said railroad on a curve to the right, having a radius of 2,507.3 feet a distance of 705.37 feet;
thence still along said northerly property line of said railroad South 66 degrees 25 minutes 47 seconds West a distance of 404.07 feet to the prolongation southerly of the easterly side of Hunter Avenue (Lorillard Avenue) as laid out on Map of Pelham Park by C. J. Byrne, July 4, 1873, filed Westchester County September 20, 1873, as Map No. 599;
thence northerly along said prolongation and along the easterly line of said Hunter Avenue as laid out on said map 559.32 feet to a point in the most southerly line of Lot 51 in Block 5135 on the Tax Map of the City of New York for the Borough of Bronx;
thence westerly along said most southerly line of said tax lot 51 in Block 5135 a distance of 150.00 feet to the westerly line of said tax lot 51;
thence northerly along said last mentioned line 150.00 feet to the southerly line of said tax lot 51;
thence westerly along said last mentioned line 100.00 feet to the easterly side of Boller Avenue (Sea View Avenue) as shown on Map No. 599 above mentioned;
thence northerly along said easterly side of Boller Avenue 306.85 feet to the easterly or southeasterly side of Hutchinson River Parkway Extension;

SCHEDULE A (Continued)

PARCEL A (Continued)

thence northeasterly along the southeasterly side of said Hutchinson River Parkway Extension as presently laid out the following four courses and distances: (1) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,102.34 feet; (2) North 66 degrees 58 minutes 06.6 seconds East a distance 29.85 feet; (3) North 16 degrees 59 minutes 47 seconds West a distance of 20.81 feet; (4) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,291.32 feet to the point or place of BEGINNING.

PARCEL B:

ALL that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly bounded and described as follows:

BEGINNING at a point on the easterly boundary of the New England Thruway as laid out on a map filed May 17, 1948, as Map No. 2041, Bronx County, said point being 2,533.59 feet distant northwesterly along said easterly boundary from the point of intersection of the northerly boundary of Hutchinson River Parkway with said easterly boundary; running thence along said easterly boundary North 18 degrees 58 minutes 57.7 seconds West a distance of 99.88 feet to a point;
thence still along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 20.18 feet to a point;
thence North 71 degrees 01 minute 02 seconds East a distance of 219.91 feet to a point;
thence North 3 degrees 11 minutes 40.8 seconds East a distance of 101.36 feet to a point;
thence North 61 degrees 02 mirutes 19.2 seconds West a distance of 38.28 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 180.3 feet a distance of 97.55 feet to a point;
thence South 87 degrees 57 minutes 40.8 seconds West a distance of 175.02 feet to a point on the easterly boundary of the New England Thruway;
thence along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 891.66 feet to a point of curvature; running
thence along said easterly boundary and along a curve bearing to the right, having a radius of 1,500 feet, a distance of 413.18 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 3,862 feet, a distance of 445.22 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right, having a radius of 9,862 feet, a distance of 652.73 feet to a point of compound curvature;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,862 feet a distance of 382.33 feet;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,112 feet a distance of 457.18 feet to a point;
thence still along said easterly boundary along a curve bearing to the right having a radius of 1,900 feet a distance of 391.28 feet to a point of tangency in the bed of former Wright Avenue;
thence still along said easterly boundary North 34 degrees 55 minutes 50.4 seconds East a distance of 261.32 feet to a point;
thence South 37 degrees 04 minutes 09.6 seconds East a distance of 338.59 feet to a point of curvature;
thence along a curve bearing to the left having a radius of 600.0 feet, a distance of 796.25 feet to a point;
thence North 66 degrees 53 minutes 40.8 seconds East a distance of 1406.93 feet to a point;
thence North 14 degrees 31 minutes 29 seconds East a distance of 662.90 feet to a point on the southerly side of Givan Avenue as vested in the City of New York on November 22, 1960 and on April 1, 1958;
thence along said southerly side North 66 degrees 53 minutes 40.8 seconds East a distance of 44.93 feet to the westerly line of Conner Street as now laid out and vested in the City of New York;
thence South 38 degrees 21 minutes 25.0 seconds East along the westerly side of Conner Street as now laid out and vested in the City of New York a distance of 210.62 feet to a point where the same is intersected by the westerly side of an Old Road;
thence in a southerly direction and along the westerly side of said Old Road the following three courses and distances:
(1) South 5 degrees 44 minutes 50 seconds East a distance of 146.80 feet;
(2) South 11 degrees 08 minutes 00 seconds East a distance of 67.58 feet; and
(3) South 4 degrees 09 minutes 30 seconds East a distance of 2.02 feet to a point;
thence in an easterly direction across Old Road North 85 degrees 50 minutes 30 seconds East a distance of 10.13 feet to the westerly line of land acquired by the City of New York in the opening of "Public Place";
thence South 14 degrees 31 minutes 29 seconds West and along the said westerly line of the land so acquired a distance of 270.77 feet to the southerly line of the land so acquired;
thence South 75 degrees 28 minutes 31.2 seconds East and along the southerly line of the land so acquired a distance of 325.00 feet to its intersection with the United States Pierhead and Bulkhead Line of the Hutchinson River as approved by the Secretary of War on October 28, 1940, the coordinates of said point being 36019.585 North and 21426.443 West;

BEST COPY AVAILABLE

SCHEDULE A (Continued)

PARCEL B (Continued)

thence in a generally southerly direction and along the said Pierhead and Bulkhead Line the following six courses and distances:
(1) South 14 degrees 31 minutes 28.8 seconds West a distance of 400.902 feet;
(2) South 17 degrees 14 minutes 17.8 seconds West a distance of 989.050 feet;
(3) South 14 degrees 30 minutes 23.3 seconds West a distance of 382.151 feet to a point;
(4) South 08 degrees 00 minutes 32.5 seconds West a distance of 611.408 feet to a point;
(5) South 01 degrees 37 minutes 40.7 seconds East a distance of 1285.023 feet to a point; and
(6) South 50 degrees 45 minutes 28.5 seconds East a distance of 562.737 feet to a point on the aforementioned northerly boundary of Hutchinson River Parkway;
thence along said northerly boundary South 34 degrees 06 minutes 23.3 seconds West a distance of 145.00 feet to a point;
thence North 74 degrees 23 minutes 37 seconds West a distance of 720.81 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 2,587.6 feet, a distance of 1,561.85 feet to a point;
thence South 71 degrees 01 minute 02 seconds West a distance of 352.16 feet to the point or place of BEGINNING.

EXCEPT so much of the above described premises as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 214 and described as follows:

BEGINNING at the southwesterly corner of Givan Avenue and Conner Street as shown on plan No. 11791, adopted by Board of Estimate on 12/22/66 (Cal. #117) the coordinates of said corner being North 36,742.042 and West 21,841.855;

thence bearing along the southerly boundary of Givan Avenue bearing South 66 degrees 53 minutes 40.8 seconds West for a distance of 44.93 feet;
thence turning left an angle bearing South 14 degrees 31 minutes 29 seconds West for a distance of 99.4479 feet in the westerly side of Peartree Avenue; this point being the place of beginning for the description of this parcel;
thence turning left along the westerly boundary of Peartree Avenue an angle bearing South 23 degrees 06 minutes 19.2 seconds East for a distance of 50.1053 feet;
thence turning right along the westerly boundary of Peartree Avenue an angle bearing South 9 degrees 30 minutes 00 seconds West for a distance of 479.932 feet;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence along a curve bearing to the right having a radius of 12.0 feet for a distance of 18.401 feet the said curve having a center angle of 88 degrees 08 minutes 34 seconds to a point; this point being on the northerly boundary of Co-op City Blvd.;
thence continuing along the northerly boundary of Co-op City Blvd. along a curve bearing to the left having a radius of 370.0 feet for a distance of 63.5310 feet the said curve having a chord of 63.4528 feet;
thence turning right an angle bearing North 14 degrees 31 minutes 29 seconds East for a distance of 543.7111 feet to point of BEGINNING.

And EXCEPT so much of the above described premises (Parcel B) as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 217 and described as follows (2 parcels):

PARCEL I: Starting at the northeast corner of Bartow Avenue and Baychester Avenue as shown on Plan No. 11791; adopted by Board of Estimate on 12/22/66 (Cal. #117) coordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the northerly boundary of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East for a distance of 219.91 feet to a point; this point being point of beginning for the description of this Parcel;
thence turning left an angle bearing North 3 degrees 11 minutes 40.8 seconds East for a distance of 101.36 feet;
thence turning left an angle bearing North 61 degrees 02 minutes 19.2 seconds West for a distance of 38.28 feet to a point; this point being a point of tangency;
thence turning left along a curve of a radius of 180.3 feet for a distance of 97.5522 feet to a point; this point being a point of tangency;
thence continuing bearing South 87 degrees 57 minutes 40.8 seconds West for a distance of 10.3657 feet;
thence turning right an angle bearing North 71 degrees 01 minute 02.3 seconds East for a distance of 137.3151 feet;
thence turning right a 90 degree angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 177.0 feet to the northerly side of Bartow Avenue;
thence along same turning right a 90 degree angle bearing South 71 degrees 01 minute 02.3 seconds West 58.695 feet to beginning.

SCHEDULE A (Continued)

PARCEL B (Continued)

PARCEL II: BEGINNING at the northerly end of a curve connecting the northerly side of Bartow Avenue with the westerly side of Asch Loop as shown on Plan #11791, adopted by Board of Estimate on 12/22/66;
thence bearing along the westerly side of Asch Loop North 18 degrees 58 minutes 57.7 seconds West a distance of 165 feet;
thence South 71 degrees 01 minute 02.3 seconds West 15 feet;
thence South 18 degrees 58 minutes 57.7 seconds East 177 feet to northerly side of Bartow Avenue;
thence easterly along the northerly side of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East 3.0 feet to a point of curve;
thence along a curve to the left having a radius of 12.0 feet, 18.85 feet to beginning.

Together with and subject to the easements as defined and limited in deed recorded in Rec. L. 295 pg 217.

PARCEL C:

All that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

STARTING at the northeast corner of Bartow Avenue and Baychester Avenue, as shown on Plan No. 11791, adopted by the Board of Estimate, City of New York, on December 22, 1966, (Calendar No. 117) the Co-ordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the easterly boundary of Baychester Avenue Bearing North 23 degrees 06 minutes 19.2 seconds West for a distance of 145.00 feet to a point; this point being the point of beginning for the description of this parcel;
thence continuing along the easterly boundary of Baychester Avenue North 23 degrees 06 minutes 19.2 seconds West for a distance of 80.57 feet to a point;
thence turning right an angle bearing North 87 degrees 57 minutes 40.8 seconds East for a distance of 164.6543 feet to a point;
thence turning right an angle bearing South 71 degrees 01 minute 02.3 seconds West for a distance of 1.2899 feet to a point;
thence turning left an angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 39.1996 feet to a point;
thence turning right an angle bearing South 73 degrees 36 minutes 53.4 seconds West for a distance of 150.5791 feet to the point or place of BEGINNING,

SCHEDULE A (Continued)

PARCEL C (Continued)

which latter parcel was conveyed to Riverbay Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 210.

Except so much of the above described premises (Parcels A and B) as was conveyed by cession deeds(Streets) by Riverbay Corporation to The City of New York recorded 12/29/67 in Record Liber 304 pg 324, and 6/9/69 in Reel 109, pg 948.

Together with the buildings and improvements thereon erected, and together with all the right, title and interest of the Borrower, if any, of, in and to beds of the streets, roads and avenues, and any easements over property, in front of and adjoining the above-described premises;

Together with any and all structures, buildings and improvements and replacements thereof and additions thereto, now or at any time hereafter constructed, erected, installed or placed in or upon the above-described real estate and any and all fixtures, fittings, appliances, apparatus, equipment, machinery, chattels and articles of personal property, including but not limited to steam and hot water boilers, pipes, radiators, bath-tubs, water-closets, refrigerators, gas and electrical fixtures, ranges and replacements thereof, now or at any time hereafter affixed to, attached to, placed upon or used or stored on or off the site or in any way connected with the complete and comfortable use, enjoyment, occupancy or operation of the plant of the said mortgaged premises (excepting only removable trade fixtures and other personal effects owned or possessed by the tenants who may occupy the mortgaged premises).

SCHEDULE B

BORROWER'S AFFIDAVIT

As Amended By

Modification Number Three of Building Loan Agreement Dated October 9 , 1969

between

RIVERBAY CORPORATION

and

NEW YORK STATE HOUSING FINANCE AGENCY

STATE OF NEW YORK)
: ss :
COUNTY OF NEW YORK)

HAROLD OSTROFF, being duly sworn, deposes and says:

I reside at 3915 Orloff Avenue, Bronx, New York; I am the President of Riverbay Corporation, the Borrower mentioned in the foregoing Building Loan Agreement;

The consideration paid or to be paid, by said Riverbay Corporation for the loan described therein is in the sum of One Million One Hundred Twenty-eight Thousand ($1,128,000) Dollars; and that all other expenses incurred or to be incurred in connection with said loan are as follows:

Examination of title and recording fees	$ 548,000
Attorneys fees	242,500
Fees of Architects, Engineers & Surveyors	6,200,000
Supervising Governmental Agency Fee	3,290,000

The net sum available to the said Borrower for the improvement is Three Hundred Fifty Million Three Hundred Forty-seven Thousand Two Hundred Ten ($350,347,210) Dollars, of which One Hundred Sixty-three Million One Hundred Thirty-four Thousand Five Hundred Thirty-four ($163,134,534) Dollars was heretofore advanced, leaving a balance of

One Hundred Eighty-seven Million Two Hundred Twelve Thousand Six Hundred Seventy-six ($187,212,676) Dollars, less such amounts as may become due or payable for insurance premiums, interest on building loan mortgage, ground rents, taxes, assessments, water rents and sewer rents accruing during the making of the improvement, and less such amounts necessary to reimburse the said Borrower for payments made prior to the initial advance under this Building Loan Agreement, and to pay for those items of cost of said improvement, as defined in subdivision 5 of Section 2 of the Lien Law.

This statement is made pursuant to Section 22 of the Lien Law of the State of New York.

The reason this statement is made by deponent and not by the borrower is that the Borrower is a corporation and deponent is an officer thereof.

The facts herein stated are true to the knowledge of deponent.

Harold Ostroff

Sworn to before me this
9th day of October , 1969.

EZRA H. GOODMAN
Notary Public, State of New York
No. 24-6000900
Qualified in Kings County
Commission Expires March 30, 1970

MODIFICATION NUMBER FOUR

OF

BUILDING LOAN AGREEMENT

AGREEMENT, dated as of the 7th day of July, 1971, between NEW YORK STATE HOUSING FINANCE AGENCY, an agency created pursuant to the provisions of the New York State Housing Finance Agency Act, of 1250 Broadway, Borough of Manhattan, City, County and State of New York (hereinafter referred to as the "Lender"), and RIVERBAY CORPORATION, a corporation organized and existing under and by virtue of the Limited-Profit Housing Companies Law of the State of New York, constituting a mutual company thereunder, having an office at 465 Grand Street, Borough of Manhattan, City and State of New York (hereinafter referred to as the "Borrower");

WHEREAS, to provide for the issuance of Bonds in order to obtain from time to time monies with which to make Mortgage Loans, the Lender has adopted, on April 2, 1965, its Non-Profit Housing Project Bond Resolution (hereinafter referred to as the "Resolution") and proposes to adopt one or more resolutions authorizing the issuance of Notes for the same purpose; and

WHEREAS, the monies borrowed by the Lender through the issuance of Bonds and Notes for the purpose of paying interest on the Bonds and Notes issued by the Lender to obtain funds with which to make this loan to the Borrower shall constitute a part of, and be included in the computation of this Mort-

gage Loan; and

WHEREAS, the Lender and the Borrower entered into a Building Loan Agreement dated as of July 15, 1965 and filed in the Office of the County Clerk of Bronx County on July 16, 1965, as amended by Modification Number One of Building Loan Agreement dated as of April 14, 1967 and filed in the Office of the County Clerk of Bronx County on April 18, 1967, as further amended by Modification Number Two of Building Loan Agreement dated as of February 3, 1969 and filed in the Office of the County Clerk of Bronx County on February 4, 1969, and as further amended by Modification Number Three of Building Loan Agreement dated as of October 9, 1969 and filed in the Office of the County Clerk of Bronx County on October 14, 1969, which Building Loan Agreement as so amended is hereinafter referred to as the "Building Loan Agreement"; and

WHEREAS, under the Building Loan Agreement the Lender agreed to loan to the Borrower the amount of Three Hundred Sixty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($361,755,710) Dollars; and

WHEREAS, in addition to the amount of Three Hundred Sixty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($361,755,710) Dollars agreed to be loaned by the Lender to the Borrower pursuant to the Building Loan Agreement, the Lender has agreed to lend to the Borrower the amount of Sixty Million ($60,000,000) Dollars pursuant to the

Building Loan Agreement, so that the aggregate amount to be loaned by the Lender to the Borrower under the Building Loan Agreement shall be Four Hundred Twenty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($421,755,710) Dollars; and

WHEREAS, the Lender and the Borrower have agreed to further modify the Building Loan Agreement to provide for the aforesaid increase in this Mortgage Loan;

NOW, THEREFORE, the parties agree:

1. The first paragraph of Article I of the Building Loan Agreement is hereby deleted and the following paragraph is hereby substituted therefor:

> "I. The Lender agrees to make, and the Borrower agrees to accept, a loan of Four Hundred Twenty-one Million Seven Hundred Fifty-five Thousand Seven Hundred Ten ($421,755,710) Dollars to be advanced as herein provided, and to be evidenced by the Borrower's notes, payable with interest and amortization as therein provided and secured by mortgages (hereinafter referred to as the "Mortgage") on the premises described in Schedule A."

2. The Fourth sentence of the first paragraph of Article III of the Building Loan Agreement is hereby deleted and the following sentence is hereby substituted therefor:

> "However, at no time will any advance or payment be made by the Lender to the Borrower which would result in a loan in excess of ninety-three and 3/100 per cent (93.03%) of the then "Project Cost", as defined and determined in accordance with the provisions of the Limited-Profit Housing Companies Law at the time of each such advance or payment."

3. Whenever in the Building Loan Agreement reference is made to the "Note" or "Mortgage" securing the Mortgage Loan executed by Borrower, such terms shall be deemed to apply and refer to the mortgage notes and mortgages, securing the loan made and to be made by the Lender pursuant to the Building Loan Agreement, as hereby amended.

4. Schedule A annexed hereto shall be and the same hereby is substituted for Schedule A heretofore annexed to the Building Loan Agreement.

5. Schedule B annexed hereto shall be and the same hereby is substituted for Schedule B heretofore annexed to the Building Loan Agreement.

6. Except as herein amended, the Building Loan Agreement shall remain in full force and effect and in the event of any inconsistency between the Building Loan Agreement and this Modification Number Four of Building Loan Agreement, the provisions of this Modification Number Four of Building Loan Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have executed

BEST COPY AVAILABLE

. this Agreement as of the day and year first above written.

NEW YORK STATE HOUSING FINANCE AGENCY

[Corporate Seal]

By _____
Paul Belica, Executive Director

Attest:

_____

RIVERBAY CORPORATION

[Corporate Seal]

By _____
George Schechter, Vice President

Attest:

_____
Assistant Secretary

APPROVED the 7th day of July, 1971

_____
Commissioner of Housing and Community
Renewal of the State of New York

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 7th day of July, 1971, before me personally came PAUL BELICA, to me known, who, being by me duly sworn, did depose and say that he resides at No. 359 Cedar Drive, Briarcliff Manor, New York; that he is Executive Director of the New York State Housing Finance Agency, the Agency described in and which executed the foregoing instrument; that he knows the seal of said Agency; that the seal affixed to said instrument is the official seal of said Agency; that it was so affixed by order of the Members of said Agency; and that he signed his name thereto by like order.

_____

KATHLEEN M. GAUGHRAN
Notary Public, State of New York
No. 24-5281615
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1973

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 7th day of July, 1971, before me personally came GEORGE SCHECHTER, to me known, who, being by me duly sworn, did depose and say that he resides at No. 20B Defoe Place, Bronx, New York; that he is the Vice President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

_____

MATTIE BERGER
Notary Public, State of New York
No. 24-5281615
Qualified in Kings County
Commission Expires March 30, 1972

BEST COPY AVAILABLE

SCHEDULE A

PARCEL A:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

BEGINNING at the intersection of the easterly side of Hutchinson River Parkway Extension as legally opened July 19, 1941, with the westerly U. S. Pierhead and Bulkhead Line of the Hutchinson (Eastchester Creek) River, as approved by the Secretary of War October 28, 1940, having coordinates North 31,848.67 West 21,256.51;
thence along said U. S. Pierhead and Bulkhead Line the following bearings and distances: South 50 degrees 45 minutes 28.7 seconds East 123.589 feet; South 16 degrees 59 minutes 47.6 seconds East 615.405 feet; South 4 degrees 30 minutes 56.5 seconds East 706.572 feet and South 12 degrees 13 minutes 19.5 seconds West 460.965 feet;
thence South 48 degrees 02 minutes 53 seconds East 331.061 feet to the southerly U. S. Pierhead and Bulkhead Line of Givans Creek as approved by the Secretary of War October 28, 1940;
thence along the westerly U. S. Pierhead and Bulkhead Line of Hutchinson River, South 53 degrees 57 minutes 51.9 seconds East 5.010 feet to the northerly property line of land now or formerly of the New York, New Haven and Hartford Railroad Company;
thence along said northerly property line of said railroad on a curve to the right having a radius of 2,192.50 feet, a distance of 370.27 feet;
thence still along said northerly property line of said railroad South 39 degrees 41 minutes 21.4 seconds East a distance of 20.00 feet;
thence still along said northerly property line of said railroad on a curve to the right, having a radius of 2,507.3 feet a distance of 705.37 feet;
thence still along said northerly property line of said railroad South 66 degrees 25 minutes 47 seconds West a distance of 404.07 feet to the prolongation southerly of the easterly side of Hunter Avenue (Lorillard Avenue) as laid out on Map of Pelham Park by C. J. Byrne, July 4, 1873, filed Westchester County September 20, 1873, as Map No. 599;
thence northerly along said prolongation and along the easterly line of said Hunter Avenue as laid out on said map 559.32 feet to a point in the most southerly line of Lot 51 in Block 5135 on the Tax Map of the City of New York for the Borough of Bronx;
thence westerly along said most southerly line of said tax lot 51 in Block 5135 a distance of 150.00 feet to the westerly line of said tax lot 51;
thence northerly along said last mentioned line 150.00 feet to the southerly line of said tax lot 51;
thence westerly along said last mentioned line 100.00 feet to the easterly side of Boller Avenue (Sea View Avenue) as shown on Map No. 599 above mentioned;
thence northerly along said easterly side of Boller Avenue 306.85 feet to the easterly or southeasterly side of Hutchinson River Parkway Extension;

SCHEDULE A (Continued)

PARCEL A (Continued)

thence northeasterly along the southeasterly side of said Hutchinson River Parkway Extension as presently laid out the following four courses and distances: (1) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,102.34 feet; (2) North 66 degrees 58 minutes 06.6 seconds East a distance 29.85 feet; (3) North 16 degrees 59 minutes 47 seconds West a distance of 20.81 feet; (4) North 34 degrees 06 minutes 23.3 seconds East a distance of 1,291.32 feet to the point or place of BEGINNING.

PARCEL B:

ALL that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, more particularly bounded and described as follows:

BEGINNING at a point on the easterly boundary of the New England Thruway as laid out on a map filed May 17, 1948, as Map No. 2041, Bronx County, said point being 2,533.59 feet distant northwesterly along said easterly boundary from the point of intersection of the northerly boundary of Hutchinson River Parkway with said easterly boundary;
running thence along said easterly boundary North 18 degrees 58 minutes 57.7 seconds West a distance of 99.88 feet to a point;
thence still along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 20.18 feet to a point;
thence North 71 degrees 01 minute 02 seconds East a distance of 219.91 feet to a point;
thence North 3 degrees 11 minutes 40.8 seconds East a distance of 101.36 feet to a point;
thence North 61 degrees 02 minutes 19.2 seconds West a distance of 38.28 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 180.3 feet a distance of 97.55 feet to a point;
thence South 87 degrees 57 minutes 40.8 seconds West a distance of 175.02 feet to a point on the easterly boundary of the New England Thruway;
thence along said easterly boundary North 23 degrees 06 minutes 19.2 seconds West a distance of 891.66 feet to a point of curvature; running
thence along said easterly boundary and along a curve bearing to the right, having a radius of 1,500 feet, a distance of 413.18 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 3,862 feet, a distance of 445.27 feet to a point of compound curvature;
thence still along said easterly boundary and along a curve bearing to the right, having a radius of 9,862 feet, a distance of 652.73 feet to a point of compound curvature;

BEST COPY AVAILABLE

SCHEDULE A (Continued)

PARCEL B (Continued)

thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,862 feet a distance of 382.33 feet;
thence still along said easterly boundary and along a curve bearing to the right having a radius of 2,112 feet a distance of 457.18 feet to a point;
thence still along said easterly boundary along a curve bearing to the right having a radius of 1,900 feet a distance of 391.28 feet to a point of tangency in the bed of former Wright Avenue;
thence still along said easterly boundary North 34 degrees 55 minutes 50.4 seconds East a distance of 261.32 feet to a point;
thence South 37 degrees 04 minutes 09.6 seconds East a distance of 338.59 feet to a point of curvature;
thence along a curve bearing to the left having a radius of 600.0 feet, a distance of 796.25 feet to a point;
thence North 66 degrees 55 minutes 40.8 seconds East a distance of 1406.93 feet to a point;
thence North 14 degrees 31 minutes 29 seconds East a distance of 662.90 feet to a point on the southerly side of Givan Avenue as vested in the City of New York on November 22, 1960 and on April 1, 1958;
thence along said southerly side North 66 degrees 53 minutes 40.8 seconds East a distance of 44.93 feet to the westerly line of Conner Street as now laid out and vested in the City of New York;
thence South 38 degrees 21 minutes 25.0 seconds East along the westerly side of Conner Street as now laid out and vested in the City of New York a distance of 210.62 feet to a point where the same is intersected by the westerly side of an Old Road;
thence in a southerly direction and along the westerly side of said Old Road the following three courses and distances:
(1) South 5 degrees 44 minutes 50 seconds East a distance of 146.80 feet;
(2) South 11 degrees 08 minutes 00 seconds East a distance of 67.58 feet; and
(3) South 4 degrees 09 minutes 30 seconds East a distance of 2.02 feet to a point;
thence in an easterly direction across Old Road North 85 degrees 50 minutes 30 seconds East a distance of 10.13 feet to the westerly line of land acquired by the City of New York in the opening of "Public Place";
thence South 14 degrees 31 minutes 29 seconds West and along the said westerly line of the land so acquired a distance of 270.77 feet to the southerly line of the land so acquired;
thence South 75 degrees 28 minutes 31.2 seconds East and along the southerly line of the land so acquired a distance of 325.00 feet to its intersection with the United States Pierhead and Bulkhead Line of the Hutchinson River as approved by the Secretary of War on October 28, 1940, the coordinates of said point being 36019.585 North and 21426.448 West;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence in a generally southerly direction and along the said Pierhead and Bulkhead Line the following six courses and distances:
(1) South 14 degrees 31 minutes 28.8 seconds West a distance of 400.902 feet;
(2) South 17 degrees 14 minutes 17.8 seconds West a distance of 989.050 feet;
(3) South 14 degrees 30 minutes 23.3 seconds West a distance of 382.151 feet to a point;
(4) South 08 degrees 00 minutes 32.5 seconds West a distance of 611.408 feet to a point;
(5) South 01 degrees 37 minutes 40.7 seconds East a distance of 1285.023 feet to a point; and
(6) South 50 degrees 45 minutes 28.5 seconds East a distance of 562.737 feet to a point on the aforementioned northerly boundary of Hutchinson River Parkway;
thence along said northerly boundary South 34 degrees 06 minutes 23.3 seconds West a distance of 145.00 feet to a point;
thence North 74 degrees 23 minutes 37 seconds West a distance of 720.81 feet to a point of curvature;
thence along a curve bearing to the left, having a radius of 2,587.6 feet, a distance of 1,561.85 feet to a point;
thence South 71 degrees 01 minute 02 seconds West a distance of 352.16 feet to the point or place of BEGINNING.

EXCEPT so much of the above described premises as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 214 and described as follows:

BEGINNING at the southwesterly corner of Givan Avenue and Conner Street as shown on plan No. 11791, adopted by Board of Estimate on 12/22/66 (Cal. #117) the coordinates of said corner being North 36,742.042 and West 21,841.855;

thence bearing along the southerly boundary of Givan Avenue bearing South 66 degrees 53 minutes 40.8 seconds West for a distance of 44.93 feet;
thence turning left an angle bearing South 14 degrees 31 minutes 29 seconds West for a distance of 99.4479 feet in the westerly side of Peartree Avenue; this point being the place of beginning for the description of this parcel;
thence turning left along the westerly boundary of Peartree Avenue an angle bearing South 23 degrees 06 minutes 19.2 seconds East for a distance of 50.1053 feet;
thence turning right along the westerly boundary of Peartree Avenue an angle bearing South 9 degrees 30 minutes 00 seconds West for a distance of 479.932 feet;

SCHEDULE A (Continued)

PARCEL B (Continued)

thence along a curve bearing to the right having a radius of 12.0 feet for a distance of 18.461 feet the said curve having a center angle of 88 degrees 08 minutes 34 seconds to a point; this point being on the northerly boundary of Co-op City Blvd.; thence continuing along the northerly boundary of Co-op City Blvd. along a curve bearing to the left having a radius of 370.0 feet for a distance of 63.5310 feet the said curve having a chord of 63.4528 feet;
thence turning right an angle bearing North 14 degrees 31 minutes 29 seconds East for a distance of 543.7111 feet to point of BEGINNING.

And EXCEPT so much of the above described premises (Parcel B) as was conveyed by Riverbay Corporation to National Development Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 217 and described as follows (2 parcels):

PARCEL I: Starting at the northeast corner of Bartow Avenue and Baychester Avenue as shown on Plan No. 11791; adopted by Board of Estimate on 12/22/66 (Cal. #117) coordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the northerly boundary of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East for a distance of 219.91 feet to a point, this point being point of beginning for the description of this Parcel;
thence turning left an angle bearing North 3 degrees 11 minutes 40.8 seconds East for a distance of 101.36 feet;
thence turning left an angle bearing North 61 degrees 02 minutes 19.2 seconds West for a distance of 38.28 feet to a point; this point being a point of tangency;
thence turning left along a curve of a radius of 180.3 feet for a distance of 97.5522 feet to a point; this point being a point of tangency;
thence continuing bearing South 87 degrees 57 minutes 40.8 seconds West for a distance of 10.3657 feet;
thence turning right an angle bearing North 71 degrees 01 minute 02.3 seconds East for a distance of 137.3131 feet;
thence turning right a 90 degree angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 177.0 feet to the northerly side of Bartow Avenue;
thence along same turning right a 90 degree angle bearing South 71 degrees 01 minute 02.3 seconds West 58.695 feet to beginning.

SCHEDULE A (Continued)

PARCEL B (Continued)

PARCEL II: BEGINNING at the northerly end of a curve connecting the northerly side of Bartow Avenue with the westerly side of Asch Loop as shown on Plan #11791, adopted by Board of Estimate on 12/22/66;
thence bearing along the westerly side of Asch Loop North 18 degrees 58 minutes 57.7 seconds West a distance of 165 feet;
thence South 71 degrees 01 minute 02.3 seconds West 15 feet;
thence South 18 degrees 58 minutes 57.7 seconds East 177 feet to northerly side of Bartow Avenue;
thence easterly along the northerly side of Bartow Avenue North 71 degrees 01 minute 02.3 seconds East 3.0 feet to a point of curve;
thence along a curve to the left having a radius of 12.0 feet, 18.85 feet to beginning.

Together with and subject to the easements as defined and limited in deed recorded in Rec. L. 295 pg 217.

PARCEL C:

All that certain lot, piece or parcel of land, situate, lying and being in the Borough and County of the Bronx, City and State of New York, bounded and described as follows:

STARTING at the northeast corner of Bartow Avenue and Baychester Avenue, as shown on Plan No. 11791, adopted by the Board of Estimate, City of New York, on December 22, 1966, (Calendar No. 117) the Co-ordinates of said corner being North 32,097.960 and West 24,215.466;
thence bearing along the easterly boundary of Baychester Avenue Bearing North 23 degrees 06 minutes 19.2 seconds West for a distance of 145.00 feet to a point; this point being the point of beginning for the description of this parcel;
thence continuing along the easterly boundary of Baychester Avenue North 23 degrees 06 minutes 19.2 seconds West for a distance of 80.57 feet to a point;
thence turning right an angle bearing North 87 degrees 57 minutes 40.8 seconds East for a distance of 164.6543 feet to a point;
thence turning right an angle bearing South 71 degrees 01 minute 02.3 seconds West for a distance of 1.2899 feet to a point;
thence turning left an angle bearing South 18 degrees 58 minutes 57.7 seconds East for a distance of 39.1996 feet to a point;
thence turning right an angle bearing South 73 degrees 36 minutes 53.4 seconds West for a distance of 150.5791 feet to the point or place of BEGINNING,

SCHEDULE A (Continued)

PARCEL C (Continued)

which latter parcel was conveyed to Riverbay Corporation by deed recorded 12/6/67 in Rec. L. 295 pg 210.

Except so much of the above described premises (Parcels A and B) as was conveyed by cession deeds (Streets) by Riverbay Corporation to The City of New York recorded 12/29/67 in Record Liber 304 pg 324, and 6/9/69 in Reel 109, pg 948.

EXCEPT so much of the above described premises (Parcel A) as was conveyed by deed dated March 6, 1970 by Riverbay Corporation to The City of New York and recorded 4/29/70 in Reel 130, pg. 1980 and described as follows:

BEGINNING at a point on the easterly side of the Hutchinson River Parkway East (all streets mentioned herein being as shown on the "City Map" of the City of New York for the Borough of the Bronx), distant 526.874 feet northerly of the intersection of the northerly side of Boller Avenue and the easterly side of Hutchinson River Parkway East, the coordinates of which are North 30,276.340 and West 22,321.315 as used by the Topographical Bureau in the Bronx;
thence NORTH 34 degrees 06 minutes 23.3 seconds East along the easterly side of the Hutchinson River Parkway East, 282.109 feet to a point of curvature;
thence continuing along the said easterly side of Hutchinson River Parkway East along the arc of a circle of twelve foot radius, bending to the east, 1.449 feet;
thence SOUTH 61 degrees 00 minutes 00 seconds East along the southerly side of an easement 9.50 feet wide, parallel to Einstein Loop South, 444.756 feet to a point of curvature;
thence Southeastwardly along the arc of a circle of 2.50 feet radius, 3.93 feet to a point of tangency;
thence SOUTH 29 degrees 00 minutes 00 seconds West along the westerly side of an easement 9.50 feet wide, parallel to Erdman Place, 111.00 feet to a point of curvature;
thence Southwestwardly along the arc of a circle of 2.50 foot radius, 3.93 feet to a point of tangency;
thence NORTH 61 degrees 00 minutes 00 seconds West 26.00 feet to a point of curvature;
thence along the arc of a circle of 21.50 foot radius, bending southwestwardly 33.772 feet to a point of tangency;
thence SOUTH 29 degrees 00 minutes 00 seconds West along the westerly side of an easement 9.50 feet wide, parallel to Erdman Place 98.00 feet to a point;
thence NORTH 61 degrees 00 minutes 00 seconds west 247.34 feet to a point;
thence SOUTH 29 degrees 00 minutes 00 seconds west 46.922 feet to a point;
thence NORTH 61 degrees 00 minutes 00 seconds west 175.238 feet to the point or place of Beginning.

This parcel consists of part of lot 51 in Block 5135 as shown on the "Tax Map" of the City of New York, Borough of the Bronx and comprises an area of 110,080.21 square feet or 2,52709 Acres.

SCHEDULE A (Continued)

PARCEL C (Continued)

EXCEPT so much of the above described premises (Parcel B) as was conveyed by deed dated March 6, 1970 by Riverbay Corporation to The City of New York and recorded 4/29/70 in Reel 130, pg. 1984 and described as follows:

BEGINNING at a point formed by the intersection of the westerly side of Asch Loop West and a right angle line which is parallel to Bartow Avenue and Distant 177.00 feet northerly therefrom;
running thence Westwardly and at right angles to Asch Loop West, for 125.00 feet;
thence Northwardly deflecting 90 degrees to the right for 85.00 feet;
thence Eastwardly, deflecting 90 degrees to the right, for 125.00 feet to a point on the westerly side of Asch Loop West;
thence Southwardly, along the said westerly side of Asch Loop West, for 85.00 feet to the point or place of Beginning.

Together with the buildings and improvements thereon erected, and together with all the right, title and interest of the Borrower, if any, of, in and to beds of the streets, roads and avenues, and any easements over property, in front of and adjoining the above-described premises;

Together with any and all structures, buildings and improvements and replacements thereof and additions thereto, now or at any time hereafter constructed, erected, installed or placed in or upon the above-described real estate and any and all fixtures, fittings, appliances, apparatus, equipment, machinery, chattels and articles of personal property, including but not limited to steam and hot water boilers, pipes, radiators, bath-tubs, water-closets, refrigerators, gas and electrical fixtures, ranges and replacements thereof, now or at any time hereafter affixed to, attached to, placed upon or used or stored on or off the site or in any way connected with the complete and comfortable use, enjoyment, occupancy or operation of the plant of the said mortgaged premises (excepting only removable trade fixtures and other personal effects owned or possessed by the tenants who may occupy the mortgaged premises).

SCHEDULE B

BORROWER'S AFFIDAVIT

As Amended By

Modification Number Four of Building Loan Agreement Dated July 7, 1971

between

RIVERBAY CORPORATION

and

NEW YORK STATE HOUSING FINANCE AGENCY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GEORGE SCHECHTER, being duly sworn, deposes and says:

I reside at 20B Defoe Place, Bronx, New York; I am the Vice President of Riverbay Corporation, the Borrower mentioned in the foregoing Building Loan Agreement;

The consideration paid or to be paid, by said Riverbay Corporation for the loan described therein is in the sum of One Million Three Hundred Eight Thousand ($1,308,000) Dollars; and that all other expenses incurred or to be incurred in connection with said loan are as follows:

Examination of title and recording fees.....	$ 665,000
Attorneys fees.....	270,000
Fees of Architects, Engineers & Surveyors.....	6,250,000
Supervising Governmental Agency Fee.....	4,038,797

The net sum available to the said Borrower for the improvement is Four Hundred Nine Million Two Hundred Twenty-three Thousand Nine Hundred Thirteen ($409,223,913) Dollars, of which Three Hundred Twenty-eight Million Two Hundred Three Thousand One Hundred Eighty-nine and 50/100 ($328,203,189.50) Dollars was heretofore advanced, leaving a balance of

Eighty-one Million Twenty Thousand Seven Hundred Twenty-three and 50/100 ($81,020,723.50) Dollars, less such amount as may become due or payable for insurance premiums, interest on building loan mortgage, ground rents, taxes, assessments, water rents and sewer rents accruing during the making of the improvement, and less such amounts necessary to reimburse the said Borrower for payments made prior to the initial advance under this Building Loan Agreement, and to pay for those items of cost of said improvement, as defined in subdivision 5 of Section 2 of the Lien Law.

This statement is made pursuant to Section 22 of the Lien Law of the State of New York.

The reason this statement is made by deponent and not by the borrower is that the Borrower is a corporation and deponent is an officer thereof.

The facts herein stated are true to the knowledge of deponent.

George Schechter

Sworn to before me this
7th day of July, 1971.

Mattie Berger

MATTIE BERGER
Notary Public, State of New York
No. 24-5291615
Qualified in Kings County
Commission Expires March 30, 1972

EXHIBIT "15" - SALES AGENCY AGREEMENT, DATED JUNE 18, 1965 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SALES AGENCY AGREEMENT

AGREEMENT entered into as of the 18 day of June, 1965, by and between RIVERBAY CORPORATION, organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York, (hereinafter referred to as "Owner"), having its principal place of business at 465 Grand Street, New York, New York; and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent") having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, Owner, under the supervision of the Commissioner of Housing and Community Renewal of the State of New York, hereinafter referred to as the "Commissioner", is undertaking the development and operation of a cooperative housing project to be constructed pursuant to the Limited-Profit Housing Companies Law of the State of New York, and located on the site bounded generally by the New England Thruway, the Hutchinson River Parkway and the Hutchinson River, known as Co-op City, in the Borough of The Bronx, City of New York and comprising 39 buildings varying in height between 24 and 34 stories, containing approximately 15,500 cooperative apartments and a garage area with approximately 10,850 parking spaces; and

WHEREAS, the parties hereto desire to enter into a contract with regard to the sale of stock and/or other equity obligations of the owner to tenant-cooperators who will reside in the project;

EXHIBIT "15" - SALES AGENCY AGREEMENT, DATED JUNE 18, 1965 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

NOW, THEREFORE, each of the parties hereto covenants and agrees as follows:

1. The Owner agrees to employ the Agent as the exclusive sales agent of the stock and/or other equity obligations of the Owner, allocated to the dwelling units of the aforesaid project, and as the exclusive renting agent of its professional apartments and commercial space subject to the rules and regulations and procedures of the Commissioner, and the Agent agrees to undertake such employment.

2. The Agent shall, in accordance with the policies and pursuant to the direction of Owner, subject to the rules, regulations and procedures established by the Commissioner:

a. Supply all personnel necessary for the sale of such stock and/or other equity obligations to tenant-cooperators, and the leasing of the professional apartments and commercial spaces.

b. Manage, operate and direct a sales office which, if required in the Owner's judgment, will be established on the site or in the neighborhood of the project. The expenses for cost and maintenance of any and all sales offices shall be paid for by the Agent.

c. Provide and use the facilities of its aforesaid office for sales and leasing to the extent required, in the Owner's judgment.

d. Advertise and publicize the project, promote the sale of stock and/or other equity obligations and maintain good relations between Owner and the general public.

e. Handle all matters pertaining to the sale of stock and/or other equity obligations of said project, and the leasing of

BEST COPY AVAILABLE

other professional apartments and commercial space including the securing of necessary credit statements and other information from prospective purchasers and lessees, the obtaining of approval of the Commissioner of each applicant, the execution of subscription and occupancy agreements and all other steps required to obtain eligible purchasers and the approval by the Commissioner of the leases and lessees of the professional apartments and commercial space.

f. Even after the full subscription and leasing of the project, Agent will continue to be available and answer inquiries and keep the public informed of building progress until full occupancy of the project. The Owner agrees to inform the Agent of building construction progress and other matters of cooperative interest. Meetings of the applicants and/or subscribers will be at the Agent's expense.

g. It shall be the responsibility of the Agent to ascertain that the schedules showing apartment location, floor and number, and superintendents' apartments conform to the approved plans and specifications of the development.

3. The Agent agrees to pay for all sales personnel, advertising, publicity and public relations, the preparation of brochures, application forms, subscription agreements and such other forms or documents as may be necessary or desirable in connection with Agent's effort, except that the Owner will pay for transfer stamps and the cost of printing stock certificates.

4. The Owner will pay the Agent, and the Agent will accept as full payment for all services rendered and expenses incurred,

the sum of $30.00 for each sale of stock to an approved applicant who has signed the Subscription and Occupancy Agreement and paid the subscription price and other equity requirements. However, the total amount to be paid to the Agent shall in no event exceed the sum of Four Hundred Fifty Thousand ($450,000) Dollars. In the event that a Building Loan Agreement is not entered into between the Owner and the New York State Housing Finance Agency or the State of New York, the Owner shall not be obligated for the payment to the Agent of any fee or expenses, notwithstanding any provisions of this Agreement. No fees and/or expenses will be paid for the leasing of the professional apartments and commercial space. Furthermore, no fees shall be payable until the Building Loan closing.

5. The fee for each such sale shall be due from the Owner to the Agent upon the approval of the application therefor by the Owner and the Commissioner, the execution of the subscription and occupancy agreements by the Tenant-Cooperator and the payment by the Tenant-Cooperator of his full equity investment.

6. All sums collected by Agent from prospective Purchasers shall be deposited in a special account in a bank or banks designated by the Owner and approved by the Commissioner. Agent, its officers, agents, servants and employees shall be covered by a fidelity bond paid for by the Agent, in an amount and form to be approved by Owner and Commissioner; which shall among other provisions name the Owner as obligee.

7. a. The Owner agrees to provide Agent with a copy of plans, specifications, Certificate of Incorporation, By-laws and

BEST COPY AVAILABLE

proposed construction contract to exhibit to prospective tenants.

b. All legal work necessary in connection with the preparation of all documents shall be done by Owner's attorneys at Owner's expense.

8. a. This Agreement shall not become binding on the parties hereto until approved by Commissioner.

b. This Agreement may not be assigned by Agent without the prior written approval of Owner and Commissioner.

9. Commissioner shall have the right to:

a. Prescribe such books and records as he deems necessary; examine, during working hours, the books of accounts and all records of the Agent relating to this Agreement and to make copies excerpts or photostats thereof;

b. Terminate this Agreement without cause upon thirty (30) days written notice to Owner and to Agent. Agent shall have no claims for loss of profits or commissions hereunder, by reason of such termination, but if Agent shall have faithfully performed all of its duties it shall receive payment as provided in paragraph 4 herein for each sale to an approved applicant who has signed Subscription and Occupancy Agreements and paid the subscription price.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized officers and their respective corporate seals hereunto affixed

and duly attested, the day and year first above written.

RIVERLAW CORPORATION

By _____
President

Attest:

_____
Assistant Secretary
[Seal]

COMMUNITY SERVICES, INC.

By _____
Vice President

Attest:

_____
Secretary
[Seal]

Approved:
COMMISSIONER OF HOUSING AND
COMMUNITY RENEWAL OF THE
STATE OF NEW YORK
This 15 day of July, 1965

By _____

EXHIBIT "16" - MODIFICATION (NO. I) OF SALES AGENCY AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION OF SALES AGENCY AGREEMENT

AGREEMENT made this 14th day of April, 1967 by and between RIVERBAY CORPORATION organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York (hereinafter referred to as the "Owner"), having its principal place of business at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent") having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, the Owner and the Agent entered into a Sales Agency Agreement dated as of June 18, 1965 (hereinafter called "Sales Agency Agreement") relating to the employment of the Agent as sales agent in connection with the project being constructed by Owner in the Borough of The Bronx, City and State of New York, known as Co-op City; and

WHEREAS, by reason of additional work required of the Agent in connection with the project and increased costs, the parties hereto have agreed to increase the Agent's fee as hereinafter provided.

NOW, THEREFORE, each of the parties hereto covenant and agree as follows:

1. The first "WHEREAS" clause of the Sales Agency Agreement is hereby amended to provide that said Co-op City

shall comprise 35 apartment buildings varying in height between 24 and 33 stories and 236 3-story town houses, containing approximately 15,372 cooperative apartments in all, and a garage area with approximately 10,850 parking spaces.

2. The first two sentences of Article 4 of the Sales Agency Agreement are hereby deleted, and the following sentences are hereby substituted therefor:

> "4. The Owner will pay the Agent, and the Agent will accept as full payment for all services rendered and expenses incurred, the sum of $33.33 for each sale of stock to an approved applicant who has signed the Subscription and Occupancy Agreement and paid the subscription price and other equity requirements. However, the total amount to be paid to the Agent shall in no event exceed the sum of Five Hundred Thousand ($500,000) Dollars."

3. Except as herein modified, the Sales Agency Agreement shall remain in full force and effect and in the event of any inconsistency between the Sales Agency Agreement and this Modification of Sales Agency Agreement, the provisions of this Modification of Sales Agency Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized officers and their respective corporate seals hereunto

affixed and duly attested, the day and year first above written.

RIVERBAY CORPORATION

By _____
President

ATTEST:

_____
Assistant Secretary

COMMUNITY SERVICES, INC

By _____
Vice-President

ATTEST:

_____
Secretary

APPROVED April 14, 1967

JAMES Wm. CAYMOR

Commissioner of Housing and
Community Renewal of the
State of New York.

By _____
Deputy Commissioner of Housing
and Community Renewal of the
State of New York

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of April, 1967, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

ROY GAMBURG
Notary Public, State of New York
No. 31-1967540
Qualified in New York County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of April, 1967, before me personally came PAUL KRAMER, to me known, who being by me duly sworn, did depose and say that he resides at No. 246 East 238th Street, Bronx, New York; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

_____
Notary Public

[illegible]
Notary Public, State of New York
No. 31-1967540
Qualified in New York County
Commission Expires March 30, 1969

MODIFICATION NUMBER II

OF

SALES AGENCY AGREEMENT

AGREEMENT made this 4th day of October, 1969 by and between RIVERBAY CORPORATION organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York (hereinafter referred to as the "Owner"), having its principal place of business at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent") having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, the Owner and the Agent entered into a Sales Agency Agreement dated as of June 18, 1965, as amended by Modification of Sales Agency Agreement dated April 14, 1967 between the Owner and the Agency (which Sales Agency Agreement, as so amended, is hereinafter called the "Sales Agency Agreement" relating to the employment of the Agent as sales agent in connection with the project being constructed by Owner in the Borough of The Bronx, City and State of New York, known as Co-op City; and

WHEREAS, by reason of additional work required of the Agent in connection with the project and increased costs, the parties hereto have agreed to increase the Agent's fee as hereinafter provided.

NOW, THEREFORE, each of the parties hereto covenant and agree as follows:

1. The first two sentences of Article 4 of the Sales

Agency Agreement are hereby deleted, and the following sentences are hereby substituted therefor, effective as of June 18, 1965:

> "4. The Owner will pay the Agent, and the Agent will accept as full payment for all services rendered and expenses incurred, the sum of $40.00 for each sale of stock to an approved applicant who has signed the Subscription and Occupancy Agreement and paid the subscription price and other equity requirements. However, the total amount to be paid to the Agent shall in no event exceed the sum of Six Hundred Thousand ($600,000) Dollars."

2. Except as herein modified, the Sales Agency Agreement shall remain in full force and effect and in the event of any inconsistency between the Sales Agency Agreement and this Modification Number II of Sales Agency Agreement, the provisions of this Modification Number II of Sales Agency Agreement shall govern:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized officers and their respective corporate seals hereunto affixed and duly attested, the day and year first above written.

RIVERBAY CORPORATION

By _____
President

COMMUNITY SERVICES, INC.

By _____

APPROVED THIS 4th DAY OF OCTOBER, 1969

_____
Commissioner of Housing and Community Renewal of the State of New York.

EXHIBIT "17" - MODIFICATION NO. II OF SALES AGENCY AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October, 1969, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

LARA N. HOOBYAR
Notary Public, State of New York
No. 24-0900060
Qualified in Kings County
Commission Expires March 30, 1970

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October, 1969, before me personally came JULIUS GOLDBERG, to me known, who being by me duly sworn, did depose and say that he resides at No. 102 Manchester Street, Westbury, New York; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

Notary Public, State of New York
No. 24-0900060
Qualified in Kings County
Commission Expires March 30, 1970

EXHIBIT "18" - ADMINISTRATIVE SERVICE AGREEMENT, DATED JUNE 18, 1965 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

ADMINISTRATIVE SERVICE AGREEMENT

AGREEMENT entered into as of the 18 day of June, 1965, by and between RIVERBAY CORPORATION, organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York (hereinafter referred to as "Owner"), having its principal place of business at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent"), having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, Owner, under the supervision of the Commissioner of Housing and Community Renewal of the State of New York (hereinafter referred to as the "Commissioner"), is undertaking the development and operation of a cooperative housing project to be constructed pursuant to the Limited-Profit Housing Companies Law of the State of New York, known as Co-op City and located in the Borough of The Bronx, City of New York; and

WHEREAS, the Agent has heretofore been supplying to Owner certain administrative services; and

WHEREAS, the parties hereto desire to enter into a contract relating to administrative services to be supplied by the Agent to the Owner during the time that the aforesaid project is being constructed and relating further to the compen-

sation to be paid by the Owner to the Agent for all such services;

NOW, THEREFORE, each of the parties hereto covenants and agrees as follows:

1. Owner agrees to employ Agent to perform or supply the administrative services hereinafter set forth during the time that the aforesaid project is under development and construction and until such project is completed and a Certificate of Completion is issued by the Commissioner, and Agent agrees to undertake such employment.

2. Agent shall, during the period described in paragraph 1 hereof and in accordance with the policies and pursuant to the direction of Owner, supply Owner with all necessary and appropriate bookkeeping services, accounting, auditing and certified public accountant's service, secretarial and other office services and help, office space, furniture, fixtures and office machines, and maintenance contracts in reference thereto, mimeographing and reproduction services, postage, organization expenses, if any, bank charges and service fees, if any, expenses for renting the commercial space in the project, office insurance, including, but not limited to, fidelity bonds, when required, and safe burglary, telephone services, heat, electricity and other office utility services, and all other administrative services covered under Item 4(c) of Schedule A annexed to the Construction Contract dated June , 1965 between the parties hereto, as determined by the Commissioner.

3. Owner will pay Agent, and Agent will accept as full payment for all of the aforesaid services heretofore and hereafter performed or supplied by Agent for Owner and for all expenses incurred by Agent in connection therewith, the sum of TWO HUNDRED THOUSAND ($200,000) DOLLARS to be paid as follows:

(a) Agent shall be paid in monthly installments of TWO THOUSAND TWO HUNDRED ($2,200) DOLLARS each commencing upon the closing of the Building Loan by the New York State Housing Finance Agency to Owner, up to a maximum of ONE HUNDRED NINETY THOUSAND ($190,000) DOLLARS.

(b) The unpaid balance shall be paid to Agent upon the issuance of a Certificate of Completion by the Commissioner.

4. Owner may at any time after the execution of this Agreement, for any reason whatsoever, upon five (5) days' notice in writing to Agent, terminate this Agreement. In the event that this Agreement is so terminated, Agent shall be only entitled to such part of its compensation hereunder as shall fairly compensate Agent for the aforesaid administrative services rendered up to the date of termination. The decision of the Commissioner with respect to the amount payable to Agent in the event of termination, shall be binding on the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized officers and their respective corporate seals to be hereunto

BEST COPY AVAILABLE

affixed and duly attested, the day and year first above written.

RIVERBAY CORPORATION

By _____
Abraham E. Kazan, President

Attest:

_____
Assistant Secretary

COMMUNITY SERVICES, INC.

By _____
Harold Ostroff, Vice President

Attest:

_____
Secretary

Approved June 15, 1965

_____
New York State Commissioner of
Housing and Community Renewal

MODIFICATION OF ADMINISTRATIVE SERVICE AGREEMENT

AGREEMENT made this 14th day of April, 1967 by and between RIVERBAY CORPORATION organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York (hereinafter referred to as the "Owner"), having its principal place of business at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent") having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, the Owner and the Agent entered into an Administrative Service Agreement dated June 18, 1965 (the "Administrative Service Agreement), relating to the employment by the Owner of the Agent to perform or supply administrative services in connection with the project being constructed by the Owner in the Borough of The Bronx, City and State of New York, known as Co-op City; and

WHEREAS, by reason of additional work required of the Agent in connection with the project and increased costs, the parties hereto have agreed to increase the Agent's fee as hereinafter provided.

NOW, THEREFORE, each of the parties hereto covenants and agree as follows:

1. The phrase "Item 4(c) of Schedule A annexed to the Construction Contract dated June 18, 1965 between the

BEST COPY AVAILABLE

parties hereto," contained in Article 2 of the Administrative Service Agreement, is hereby amended to read: "Item 6(f) of Schedule A annexed to the Construction Contract dated June 12th between the parties hereto, as amended by Modification Number I of Construction Contract dated April 14, 1967 between the parties hereto."

2. Article 3 of the Administrative Service Agreement is hereby deleted and the following Article 3 is hereby substituted therefor:

> "3. Owner will pay Agent, and Agent will accept as full payment for all of the aforesaid services heretofore and hereafter performed or supplied by Agent for Owner and for all expenses incurred by Agent in connection therewith, the sum of Two Hundred Fifty Thousand ($250,000) Dollars to be paid as follows:
>
> (a) Agent shall be paid in monthly installments of Two Thousand Seven Hundred Fifty ($2,750) each commencing upon the closing of the Building Loan by the New York State Housing Finance Agency to Owner, up to a maximum of Two Hundred Thirty-Seven Thousand Five Hundred ($237,500) Dollars.
>
> (b) The unpaid balance shall be paid to Agent upon the issuance of a Certificate of Completion by the Commissioner."

3. Except as herein modified, the Administrative Service Agreement shall remain in full force and effect and in the event of any inconsistency between the Administrative Service Agreement and this Modification of Administrative Service Agreement, the provisions of this Modification of Administrative Service Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of April, 1967, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

Notary Public, State of New York
Qualified in [illegible] County
Commission Expires March 30, 1969

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of April, 1967, before me personally came PAUL KRAMER, to me known, who being by me duly sworn, did depose and say that he resides at No. 246 East 238th Street, Bronx, New York; that he is the Vice-President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

[illegible]

EXHIBIT "19" - MODIFICATION (NO. I) OF ADMINISTRATIVE SERVICE AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

officers and their respective corporate seals hereunto affixed and duly attested, the day and year first above written.

RIVERBAY CORPORATION

By _____
President

ATTEST:

_____
Assistant Secretary

COMMUNITY SERVICES, INC.

By _____
Vice President

ATTEST:

_____
Secretary

APPROVED: April 14, 1967

JAMES Wm. GAYNOR
Commissioner of Housing and Community Renewal of the State of New York

By _____
Deputy Commissioner of Housing and Community Renewal of the State of New York

EXHIBIT "20" - MODIFICATION NO. II OF ADMINISTRATIVE SERVICE AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

MODIFICATION NUMBER II

OF

ADMINISTRATIVE SERVICE AGREEMENT

AGREEMENT made this 9th day of October, 1969 by and between RIVERBAY CORPORATION organized under and pursuant to the provisions of the Limited-Profit Housing Companies Law of the State of New York (hereinafter referred to as the "Owner"), having its principal place of business at 465 Grand Street, New York, New York, and COMMUNITY SERVICES, INC., a New York corporation (hereinafter referred to as "Agent") having its principal place of business at 465 Grand Street, New York, New York.

WHEREAS, the Owner and the Agent entered into an Administrative Service Agreement dated June 18, 1965, as amended by Modification of Administrative Service Agreement dated April 14, 1967 between the Owner and the Agent (which Administrative Service Agreement, as so amended, is hereinafter called the "Administrative Service Agreement"), relating to the employment by the Owner of the Agent to perform or supply administrative services in connection with the project being constructed by the Owner in the Borough of The Bronx, City and State of New York, known as Co-op City; and

WHEREAS, by reason of additional work required of the Agent in connection with the project and increased costs, the parties hereto have agreed to increase the Agent's fee as hereinafter provided.

NOW, THEREFORE, each of the parties hereto covenant and agree as follows:

1. The phrase "Item 6(f) of Schedule A annexed to the Construction Contract dated June 18, 1965 between the parties hereto, as amended by Modification Number I of Construction Contract dated April 14, 1967 between the parties hereto," contained in Article 2 of the Administrative Service Agreement, is hereby amended to read "Item 6(f) of Schedule A annexed to the Construction Contract dated June 18, 1965 between the parties hereto, as amended by Modification Number I of Construction Contract dated April 14, 1967, Modification Number II of Construction Contract dated January 22, 1968, Modification Number III of Construction Contract dated March 29, 1968 and Modification Number IV of Construction Contract dated October 9, 1969, between the parties hereto."

2. Article 3 of the Administrative Service Agreement is hereby deleted and the following Article 3 is hereby substituted therefor, effective of June 18, 1965:

> "3. Owner will pay Agent, and Agent will accept as full payment for all of the aforesaid services heretofore and hereafter performed or supplied by Agent for Owner and for all expenses incurred by Agent in connection therewith, the sum of Three Hundred Thousand ($300,000) Dollars to be paid as follows:
>
> (a) Agent shall be paid in monthly installments of Three Thousand Three Hundred ($3,300) Dollars each commencing upon the closing of the Building Loan by the New York State Housing Finance Agency to Owner, up to a maximum of Two Hundred Eighty-five Thousand ($285,000) Dollars.
>
> (b) The unpaid balance shall be paid to Agent upon the issuance of a Certificate of Completion by the Commissioner."

3. Except as herein modified, the Administrative Service Agreement shall remain in full force and effect and in the event of any inconsistency between the Administrative Service Agreement and this Modification Number II of Administrative Service Agreement, the provisions of this Modification Numer II of Administrative Service Agreement shall govern.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized officers and their respective corporate seals hereunto affixed and duly attested, the day and year first above written.

RIVERBAY CORPORATION

By _____
President

COMMUNITY SERVICES, INC.

By _____
Vice President

APPROVED: December ~~October~~ 4, 1969

_____
Commissioner of Housing and Community Renewal of the State of New York

EXHIBIT "20" - MODIFICATION NO. II OF ADMINISTRATIVE SERVICE AGREEMENT - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October, 1969, before me personally came HAROLD OSTROFF, to me known, who being by me duly sworn, did depose and say that he resides at No. 3915 Orloff Avenue, Bronx 63, New York; that he is the President of RIVERBAY CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

EZRA H. GOODMAN
Notary Public, State of New York
No. 24-6990960
Qualified in Kings County
Commission Expires March 30, 1970

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 9th day of October, 1969, before me personally came JULIUS GOLDBERG, to me known, who being by me duly sworn, did depose and say that he resides at No. 102 Manchester Street, Westbury, New York; that he is the Vice President of COMMUNITY SERVICES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Notary Public

EZRA H. GOODMAN
Notary Public, State of New York
No. 24-6990960
Qualified in Kings County
Commission Expires March 30, 1970

EXHIBIT "21" - LETTER DATED JUNE 16, 1965, FROM COMMUNITY TO MR. PAUL BELICA, CONTAINING HANDWRITTEN ENDORSEMENT ON THE FACE THEREOF, WITH DECEMBER 31, 1964 UNAUDITED BALANCE SHEET ATTACHED - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

COMMUNITY SERVICES, INC.

ABRAHAM E. KAZAN . . President
HAROLD OSTROFF . . . Vice President
RALPH LITTMAN . . . . Secretary
SIDNEY VYORST . . . . Asst. Secretary
PAUL KRAMER . . . . . Treasurer

465 GRAND STREET, NEW YORK 2, N. Y.
ORegon 3-3900

June 16, 1965

7 copies

For file copy

Mr. Paul Belica
Executive Director
State Housing Finance Agency
393 Seventh Avenue
New York 1, N. Y.

Dear Mr. Belica:

We have previously submitted to you the balance sheet of Community Services, Inc. as of December 31, 1964 (unaudited).

This is to certify that the net worth of Community Services, Inc. as of May 31, 1965 is as great or greater than at December 31, 1964.

The balance sheet at December 31, 1964 does not reflect the construction supervision fees which will be due from Amalgamated Warbasse Houses, Inc. and Rochdale Village, Inc. at the completion of those projects, which is contemplated before the end of 1965. It is estimated that these fees will amount to $1,000,000 before taxes.

Sincerely yours,

COMMUNITY SERVICES, INC.

Paul Kramer
Comptroller

PK:cb

The financial statement and this letter updating it has been requested as a matter of routine in view of past performance of b/c and the technical set up of the operation. The liquid asset prequalifying has been waived on past cases and it is waived for this project also.

EXHIBIT "21"

BEST COPY AVAILABLE

EXHIBIT "21" - LETTER DATED JUNE 16, 1965, FROM COMMUNITY TO MR. PAUL BELICA, CONTAINING HANDWRITTEN ENDORSEMENT ON THE FACE THEREOF, WITH DECEMBER 31, 1964 UNAUDITED BALANCE SHEET ATTACHED - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

COMMUNITY SERVICES, INC.

Balance Sheet as of December 31, 1964 (Unaudited)

ASSETS

Current Assets		
Cash in Bank		
Regular Account	$ 44,589	
Payroll Accounts	2,118	
Insurance Department	28,344	
		$ 75,051
Petty Cash Funds		450
Notes Receivable - Equity Loans		28,564
Accrued Interest Receivable		266
Accounts Receivable		
Publicity & Education Department	$ 9,131	
Payroll Exchange Account	25,512	
Insurance Department	109,455	
Laundry Department	22,140	
Miscellaneous	34,913	
		201,151
Loans Receivable		
United Housing Foundation	$ 1,345	
Co-op City	100,250	
Mutual Redevelopment Houses	170,000	
Co-op Furniture Center, Inc.	20,000	
		201,595
Total Current Assets		$597,077
Fixed Assets		
Office & Miscellaneous Equipment	$ 68,894	
Less: Accumulated Depreciation	31,973	
	36,921	
Laundry Dept. Equipment	$303,292	
Less: Accumulated Depreciation	112,678	
	190,614	
		227,535
Investment in Intercooperative Petroleum Association, Inc.		1,000
Prepaid Expenses		23,730
Architect's Revolving Fund		7,500
Total Assets		$856,842

EXHIBIT "21" - LETTER DATED JUNE 16, 1965, FROM COMMUNITY TO MR. PAUL BELICA, CONTAINING HANDWRITTEN ENDORSEMENT ON THE FACE THEREOF, WITH DECEMBER 31, 1964 UNAUDITED BALANCE SHEET ATTACHED - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

COMMUNITY SERVICES, INC.

Balance Sheet as of December 31, 1964 (Unaudited)

LIABILITIES AND NET WORTH

Current Liabilities		
Advances from Rochdale Village, Inc.		$290,000
Advances from Amalgamated Warbasse Houses, Inc.		130,000
Accounts Payable - Insurance Dept.		137,849
Payroll Taxes Payable		7,485
Accrued Expenses and Other Payables		48,286
Accrued Pension Plan Expense		6,046
State Franchise Tax Payable		3,279
Federal Income Tax Payable		32,025
Total Current Liabilities		$654,970
Net Worth		
Capital Stock		$ 300
General Reserve - Balance, January 1, 1964	$142,808	
Add: Restoration of Investment Credit to Fixed Assets	3,523	
Add: Net Gain for the year ended December 31, 1964	55,241	
Balance, December 31, 1964		201,572
Total Capital		201,872
Total Liabilities and Net Worth		$856,842

EXHIBIT "22" - LETTER DATED JUNE 18, 1965, FROM COMMUNITY TO NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

COMMUNITY SERVICES, INC.

ABRAHAM E. KAZAN . . President
HAROLD OSTROFF . . . Vice President
RALPH LIPPMAN . . . . Secretary
SIDNEY VYORST . . . . Asst. Secretary
PAUL KRAMER . . . . . Treasurer

465 GRAND STREET, NEW YORK, N. Y. 10002
ORegon 3-3900

June 18, 1965

New York State Division of Housing
and Community Renewal
393 Seventh Avenue
New York, New York - 10001

Attn: Mr. George Cherr,
Assistant Commissioner, Project Development

Re: Co-op City
HCLP NO. 64-571

Gentlemen:

We wish to state for your record that it is our considered opinion that the above mentioned project can be built in accordance with the plans, specifications and addendum dated and signed on June 18, 1965 within the limitation of the development cost stated on Schedule A dated June 18, 1965.

Very truly yours,

COMMUNITY SERVICES, INC.

By _____
Abraham E. Kazan, President

BEST COPY AVAILABLE

EXHIBIT "23" - LETTER DATED JUNE 18, 1965, FROM RIVERBAY TO NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION

465 GRAND STREET • NEW YORK, N. Y. 10002
ORegon 3-3900

CO-OP CITY

ABRAHAM E. KAZAN.....President
JACOB S. POTOFSKY.....Vice President
LOUIS STULBERG.....Secretary
ROBERT SZOLD.....Treasurer
HAROLD OSTROFF.....Asst. Secretary

SPONSOR
UNITED HOUSING FOUNDATIO

June 18, 1965

New York State Division of Housing
and Community Renewal
393 Seventh Avenue
New York, New York - 10001

Attn: Mr. George Cherr,
Assistant Commissioner, Project Development

Re: Co-op City
HCLP NO. 64-571

Gentlemen:

We wish to state for your record that it is our considered opinion that the above mentioned project can be built in accordance with the plans, specifications and addendum dated and signed on June 18, 1965 within the limitation of the development cost stated on Schedule A dated June 18, 1965.

Very truly yours,

RIVERBAY CORPORATION

By _____
Abraham E. Kazan, President

A HOUSING DEVELOPMENT COOPERATIVELY OWNED AND OPERATED

EXHIBIT "24" - RIVERBAY RENT SCHEDULE AND EQUITY
REQUIREMENTS, DATED JUNE 1, 1965
AND APPROVED JULY 15, 1965 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORP.
Co-Op City

Rent Schedule & Equity Requirements

Rent Schedule

Apt. Size	No. of R. R.	Rental Range Per D. U.	Rental Range Per R. R.	Average Rent Per R.R.	Monthly Carrying Charges	Average Utilities per D.U.	Utilities per D.U.	Total Rent Roll
3½	13,797	$63-91	$18-26	$22	$ 303,540	$10.00	$ 39,420	$ 342,960
4	5,600	80-112	20-28	24	134,402	10.25	14,350	148,752
4½	15,946	81-117	18-26	22	350,863	11.00	36,984	387,847
5	14,900	100-140	20-28	24	357,608	11.25	33,525	391,133
6	11,844	114-162	19-27	23	272,420	12.25	24,181	296,601
6½	10,790	130-182	20-28	24	258,970	12.50	20,750	279,720
	72,879			$23.02	$ 1,677,803	$11.04	$ 171,210	$ 1,849,013
					$20,133,636		$2,054,520	$22,188,156

Annual Rent Roll - 12 x $1,677,803

*3&4 condos

Equity Requirements

72,879 Rental Rooms @ $450. = $32,795,550.

APPROVED: RIVERBAY CORPORATION

APPROVED: this 15th day of July 1965

Date: _____

346a

EXHIBIT "24"

BEST COPY AVAILABLE

347a

SCHEDULE A

Name of Project RIVERBAY CORP. (CO-OP CITY) (X) Cooperative

Address of Project BRONX, NEW YORK ( ) Rental

Date June 18, 1965

NCLP # 04-2.2

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	Per Rental Room (4)
1. CONSTRUCTION COSTS				
a. 1. Residential Structures	$183,828,000			
2. Commercial Structures & Community Spaces	7,750,000			
3. Garages Including Piles	17,000,000			
4. Site work & Landscaping	4,500,000			
5. Heating Plant Power Plant incl. Piles	26,000,000			
b. 1. Abnormal Foundations Piles (Res.& Car.)	7,500,000			
2. Other Abnormal Features Fill	6,100,000			
c. Demolition Costs City Site Work	2,829,750			
d. Test Borings	300,000			
e. Premium on Bonds	700,000			
f. Contractor's Home Office Overhead -.78%	2,000,000	$256,507,750		
g. Contractor's Fee - 0%	0			
2. PROFESSIONAL SERVICES		2,000,000	$258,507,750	$3,547
a. Architect's Fees	2,350,000			
b. Legal Fees	150,000			
c. Preliminary Surveys and Title Search	400,000			
d. Professional Engineer's & Laboratory Fees Incl. Fill Placement & Compaction Insp. Eng.	750,000	3,650,000		
3. SELLING OR RENTING EXPENSES				$.50
a. Selling Expenses	450,000			
b. Renting Expenses		450,000		$.6
4. CARRYING AND FINANCING CHARGES				
a. Interest @ % for Months	6,250,000			
b. Taxes @ % for Months on A.V. of	2,500,000			
c. N.C. Administrative Expenses	200,000			
d. Supervising Governmental Agency Fee 1.0%	2,509,000			
e. Financing Expenses 0.25	501,500			
f. Title and Recording Expenses	340,000	12,300,800		169
g. Contractor's Home Office Overhead - Non-Construction Items - %				(137)
h. Contractor's Profit on Non-Construction Items - %	(10,000,000)			
5. TOTAL		(10,000,000)	$ 6,400,800	
6. COST OF LAND ACQUISITION		170,250	$264,208,550	$3,635
a. Carrying Charges & Expenses		15,561,342		
7. ESTIMATED TOTAL DEVELOPMENT COST		581,858	16,113,450	$.221
8. CONTINGENCY - 0.7 % of Item #7		(200,000)		
			$281,022,000	$3,856
9. WORKING CAPITAL -0.24 % of Item #7		2,000,000		
10. ESTIMATED TOTAL CAPITAL REQUIREMENTS		673,550	2,673,550	$.37
11. MORTGAGE LOAN - 88.1% of Item #10			$283,695,550	$3,893
12. EQUITY REQUIREMENTS			$250,900,000	$3,443
a. 1. No. of Shares of Common Capital Stock			$ 32,795,550	$.450
2. Par Value - $				
b. Income Debentures (Interest %)				
c. Total Equity Capital				

No. of D.U.'s 15,500

Cost Per D.U. $18,130

No. of Rental Rooms 72,879

Cost Per Rental Room 3,856

RPA-LPH-2.24 (3/64)

2.24

EXHIBIT "25"

EXHIBIT "25" - SCHEDULES A & B, DATED JUNE 1st, 1965 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE B

Name of Project RIVERBAY CORP. (CO-OP CITY) Date JUNE 18, 1965 MCLP #64-571

No. of Dwelling Units	15,500	Land Area 9,147,600 Sq. Ft. 210 Acres	
No. of Rental Rooms	72,879	Land Coverage Residential 8 %	
Average Rental Rooms per D.U.	4.7	Density 79 Persons per Acre	
No. of Residential Buildings	39	No. of Garage Car Spaces 10,850	
No. of Stories per Building*	14;37;15 ;34	Cubage of Garages 28,000,600	
Cubage of Residential Bldgs.	45,170,000; 52,254,350; 46,000,650	No. of Parking Spaces	
Cubage of Commercial Bldgs.	6,200,000	Cubage of Power Plant	3,600,000
Community Center	1,800,000		
Mortgage Loan	$250,900,000	Estimated Total Development Cost	$281,022,000
Equity Requirements	$ 32,795,550	Land Cost	$ 16,113,450
Estimated Total Capital Requirements	$283,695,550	Zone Use. R-5	
Construction Contract Amount	$258,507,750	Estimated Net Taxable Assessment	$140,511,000

*For Each Different Story Height.

ESTIMATED RENT SUMMARY
(First Full Year of Operation)

A. V. of Land	$ 16,113,450			Level Debt Service Factor (.04900)
A. V. of Building(s)	$ 264,908,550			
Tax Exemption 50.8 of	$ 281,022,000	=	$140,511,000	
Net Taxable Assessment			$140,511,000	
a. Total Interest and Amortization on Mortgage				$ 12,309,1
b. Real Estate Taxes at Tax Rate of 5.04 $ on $140,511,000				$ 7,081,7
c. Maintenance and Operations ($68.49 per Rental Room) 69,859				$ 4,784,7
d. Reserve for Replacements ($ 5.00 per Rental Room) 69,859				$ 349,0
e. Governmental Agency Charge .0035 x 250,900,000				$ 870,1
f. Return on Equity Capital				$ - -
$ on $ Capital Stock		$ - -		$ - -
$ on $ Debentures		$ - -		$ - -
g. New York State Franchise Taxes - included in c.				$ - -
h. Annual Expenses				$ 25,403,-
i. Garage Rent $ 17.50 per Car x No. of Cars 10,850 x 12		$2,278,500		
Less 5% vacancy loss	$113,925	Net Garage Rent	$2,164,575	
j. Parking Rent $ per Car x No. of Cars x 12				
Less % vacancy loss		Net Parking Rent	$	
k. Income from Other Sources:				
Professional Apartments	$ 100,000			
Washing Machines & Other	$ 500,000			
Commercial Rentals 21,000,000 @ 5% Vac. 50,000	$ 950,000		$ 1,550,000	
l. Deduct: Annual Income from Garage, Parking & Other Sources				$ 3,714,-
m. Net Annual Expense Exclusive of Vacancy Loss & Tenant's Gas & Electricity @ $11.00 per D.U. per mo.				$ 21,000,- 2,0[illegible] 19,0[illegible]
n. Add: Dwelling Vacancy, Collection Losses & Contingencies Allowance of 2½ % of Item "m"				491,0
o. Total Net Annual Expense				$ 20,133,-
p. Average Rent per Rental Room per Month, Exclusive of Tenant's Gas & Electricity				$ 23.00
q. Average Rent per D.U. per Month, Exclusive of Tenant's Gas & Electricity				$ 108.25
r. Tenant's Gas and Electricity per D.U. per Month				$ 11.00
s. Average Rent per D.U. per Month (Including Tenant's Gas & Electricity				$ 119.25

APARTMENT DISTRIBUTION

Quantity	Apt. Size	% of Total	Rental Rooms
3,942	3½	25	13,797
* 1,400	4	9	5,600
3,544	4½	23	15,948
* 2,980	5	19	14,900
1,974	6	13	11,844
* 1,660	6½	11	10,790
15,500		100	72,879
*Balconies - 6040 x 1/2			3,000*
			69,879

HFA-LPA-2.2A (9-65)

SCHEDULE A

Date: 3-23-67

Name of Project RIVERBAY CORPORATION (X) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

MCLP # 64-571

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) cost per Rental Room
1. COST OF LAND ACQUISITION City of New York		170,250		
a. No. of sq. ft. 2,997,705	$ 1.20 per sq. ft.	$15,561,312		
b. Carrying Charges & Expenses		$ 487,390		
c. Relocation and Other National Development Corp.		$ (200,000)	$16,018,882	$ .220
2. CONSTRUCTION COSTS Site Fill	$ 6,850,000			
a. [illegible]				
b. Abnormal Foundations & Conditions-Piles	$ 7,200,000			
c. Residential Structures/Community Bldgs.	$199,735,000			
d. Commercial Structures (if separate)	$ 7,950,000			
e. Garages Structures (if separate)	$ 12,600,000			
f. Other Structures Power Plant	$ 22,216,000			
g. Site Work	$ 5,000,000			
h. Off-site work	$ 14,629,750			
i. Demolition costs	850,000	$265,830,750		
j. Contractor's Overhead & Profit for Overhead 1% of Items 2a.-i.	800,000	$ 2,000,000	$267,830,750	$3,674.
3. DEVELOPMENT FEE 1% of Items 2a.-i.			$	$
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,550,000		
b. Engineer's Inspection Fees		$ 350,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 200,000		
e. Preliminary Surveys		$ 400,000		
f. Legal Fees		$ 150,000	$3,850,000	$ .53
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 500,000		
b. Advertising & Promotion		$		
c. Other		$	$ 500,000	$ .7.
6. CARRYING & FINANCING CHARGES				
a. Interest @ % for Months		$ 6,500,000		
b. R.E. Tax @ % for Months on A.V.		$ 2,600,000		
c. Supervising Governmental Agency Fee		$ 2,610,000		
d. Financing Expenses		$ 522,000		
e. Title and Recording Expenses		$ 353,000		
f. R.E. Administrative Expenses		250,000		
6. Subsidy from Philanthropy Rental Shortage Operations	$	$(10,000,000)	$2,835,000	$ .39.
7. ESTIMATED DEVELOPMENT COST			$291,034,732	$ .3,993.
8. CONTINGENCY - % of Item 7.			$ 2,000,000	
9. WORKING CAPITAL - % of Item 7.			$ 768,438	.03
10. ESTIMATED PROJECT COST			$293,803,200	$ 4,032.
11. MAXIMUM MORTGAGE LOAN - % of Item 10.			$261,000,000	3,581
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$ 32,803,200	$ .450.
a. 1. No. of Class A Shares x (Par Value)	$	$		
2. No. of Class B Shares 1,312,128 (Par Value)	$25.00	$ 32,803,200		
b. Income Debentures (Interest at %)		$	$32,803,200	
c. Capital Contribution			$	

No. of H.U. 15,372 No. of Rental Rooms 72,896

Cost per H.U. $18,933 (Item 7, Col. 3 ÷ No. of H.U.) Cost per Rental Room $ 3,992 (Item 7, Col. 4)

HFA-LPA-2.2A (9-65)

EXHIBIT "26"

EXHIBIT "26" - SCHEDULES A, B & C, DATED MARCH 13, 1967 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE B

Name of project RIVERBAY CORPORATION (CO-OP CITY) Date of schedule 3-23-67

(X) Cooperative ( ) Rental ( ) Non-Profit

Residential rental rooms 72,856 including 2,056 balconies

ESTIMATED ANNUAL EXPENSES AND INCOME

COMPUTATION OF ASSESSED VALUATIONS:

Assessed valuation of land	$ 24,400,000
Assessed valuation of building(s)	$237,600,000
Total assessed valuation	$262,000,000
Tax exemption $ 50 % of total	$128,500,000
Net taxable assessment	$133,500,000

TERMS AND CONDITIONS OF MORTGAGE:

Mortgage interest rate 4.0 %
term 40 years

Maximum mortgage loan $ 262,000,000
Debt service factor 5.05

	(1)	(2)
I. CARRYING CHARGES & OPERATING EXPENSES		
a. Interest and amortization on mortgage		$13,206,600.
b. Governmental agency charge 0.25 %		$ 652,500.
c. Governmental agency supervision fee		$
d. N.Y.S. franchise taxes (and federal income tax)		$ 147,000.
e. Real estate taxes		
i. (1) Municipal taxes @ 5.50 % on net A.V.	$ 7,342,500.	
(2) Assessment for local improvements @ % on total A.V.	$	$ 7,342,500.
ii. Other local taxes		$
f. Maintenance & operations $ 73.89 per rental room per year x 69,930		$ 5,092,200.
g. Reserves for painting & decorating $ per rental room per year		$
h. Reserves for replacement $ 5.00 per rental room per year x 69,930		$ 349,650.
i. Return on equity capital		
i. % on $ of shares	$	
ii. % on $ of debentures	$	$
j. Other expenses (specify)		$
TOTAL		$26,729,454.
2. OFFSETS: NON-HOUSING INCOME		
a. Parking income		
i. 10,860 indoor spaces @ $ 180.00 per year		
less 5 % vacancy loss equals net indoor rent	$ 1,855,350.	
ii. outdoor spaces @ $ per year		
less % vacancy loss equals net outdoor rent	$	
b. Income from other sources		
i. Washing & vending machines @ $ per m.u. per year x no. of m.u.	$ 509,000.	
ii. Professional spaces $ 100,000 per year (30 x $3,333.33)		
less 10 % vacancy loss equals	$ 99,000.	
iii. Commercial spaces $ 700,000 per year (200 x sq. ft. @ $3.50)		
less 10 % vacancy loss equals	630,000	
TOTAL	$2,204,204	$ 5,279,454.
3. NET ANNUAL EXPENSE (Exclusive of allowance for vacancies and contingencies and tenants' utilities)		$21,449,000.
Total #1 less Total #2		
4. ADD: Allowance for vacancies and contingencies (2 % of item 3.)		$ 428,800.
5. TOTAL NET ANNUAL EXPENSE		$21,868,800

Net income to be derived from housing units exclusive of tenants' utilities.

HOUSING RENT OR CARRYING CHARGE PER MONTH

	Exclusive of Utilities	Utilities	Total
Per rental room	$ 25.00	$ 2.32	$ 27.32
Per housing unit	$118.55	$11.00	$129.55

2.c. Other Income

Cost of Utilities included in M & O and included in Carrying Charges 15,372 D.U.'s @ $11.00 per mo.	$2,029,104.
Interest earned on Debt Service and Escrow Fund Deposits	175,000.
Total	$2,204,204.

BFA-1/70-2.2a (4-66)

BEST COPY AVAILABLE

Project No. 61-572
Date 3-23-67

FINANCIAL ESTIMATES OF RIVERBAY CORPORATION (CO-OP CITY)

A LIMITED PROFIT (NON-PROFIT) HOUSING PROJECT

Located at NEW ENGLAND THRUWAY & HUTCHINSON RIVER

County of
Town of BRONX, N. Y.
Borough of

Block No.: 5235, 5241 Lot No.: 52, 100

(X) Cooperative (Mutual) ( ) Rental ( ) Non-Profit

PROJECT STATISTICS

Proposed zoning R-6
No. of housing units 15,372
No. of rental rooms 72,856
Average rental rooms per H.U. 4.74
Total parking 10,860

Total land area 13,107,200 sq. ft. 300.9 acres
Net land area 9,185,000 sq. ft. 210.9 acres
Land coverage 3,922,200 sq. ft. 30 % total
Density 278 persons per acre
Ratio of parking to H.U.'s 70.6 %

Types of Structures	No. of Bldgs.	No. of Stories per Bldg.	No. of Elevators per Bldg.	Sq. Ft. Area (Typical Flr.)	Cubage of Bldgs.
Residential Garden Apts.	10	24	4	20,610	24,000,000
Residential Tower	15	33	4	15,580	4,000,000
Residential Town Houses	230	3	-	2,469 total bldg. flr. area	20,000
Commercial Stores	3	1 & 2	2	250,000	2,500,000
Garage	8	6 & Roof	2	59,718	2,970,000
Other Buildings (Power,	1	1	- -	35,000	2,480,000
Total				13,400	210,000,000

APARTMENT DISTRIBUTION

Apartment Type	Housing Units	Rental Rooms Per Unit	Rental Rooms Total	Distribution %	Max. No. of Persons per H.U.	Maximum No. of Persons
1 Bed Room	3660	3.5	13,520	25.0	2	7,320
1 Bed Room w/Balcony	1875	4.0	5,760	11.0	2	3,750
2 Bed Room	3920	4.5	17,640	25.5	4	15,680
2 Bed Room w/Balcony	1650	5.0	8,250	12.0	4	7,200
3 Bed Room	1650	6.0	9,900	11.0	6	9,870
3 Bed Room w/Balcony	2220	6.5	14,430	14.0	6	13,320
3 Bed Room	236	7.0	1,652	1.5	6	1,416
Professional	29	4.5	—	—	—	—
Superintendent	10 1	5.5 6.5	—	—		
TOTALS	15,412		72,896	2356	—	58,648

SUMMARY OF ESTIMATED COSTS

ESTIMATED TOTAL DEVELOPMENT COST	$
WORKING CAPITAL AND CONTINGENCY	$
TOTAL ESTIMATED PROJECT COST	$293,893,200
MAXIMUM MORTGAGE LOAN	$262,000,000
EQUITY CAPITAL REQUIREMENTS OR CAPITAL CONTRIBUTION	
a. i. ____ No. of Class A Shares X $ ____ Par Value	= $
ii. 1,272,123 No. of Class B Shares X $ 25.00 Par Value	= $32,803,202
b. Income debenture (____ % interest)	$
c. Capital contribution	$
	$32,803,202.

MAXIMUM AVERAGE RENT OR CARRYING CHARGE (Excluding Utilities) PER MONTH

$ 25.00 Per Residential Rental Room

BFA-1/70-2.2 (4-66)

EXHIBIT "26" - SCHEDULES A, B & C, DATED MARCH 13, 1967 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION

Schedule C (Revision)
March 13, 1967

It has been approximately two years since we filed all the appropriate agreements in connection with Co-op City. Since that time the scope and the physical set-up of the development has changed materially.

Our original physical set-up called for 39 high-rise buildings of varying size on a plot plan which did not include an educational park in the center. Now, due to the requirements of the City Planning Commission, the State Division of Housing and our own desire to make Co-op City as attractive as possible, we have a completely new site plan.

Briefly stated, the plan now provides 35 high-rise buildings of various sizes and some 236 two-family, low-rise town houses. We have reduced the number of garage buildings from nine to eight and have condensed the original five to six shopping areas into three areas.

The Planning Commission and the Board of Estimate have come to a final decision regarding an educational park which would house five of the six educational institutions originally planned for. We have had to carve out approximately twenty-six acres of land fronting on the New England Thruway, which has forced many of our buildings into areas which we previously anticipated leaving open. We had planned to leave these areas open because of the preliminary knowledge that they presented the most difficult foundation problems.

As we now review the impact of the above, we find our original estimates insufficient to cover these many changes that have been made necessary.

Our original concept of Co-op City, insofar as plans and specifications are concerned, was based on more or less the same type of building that was provided at Rochdale Village and Amalgamated Warbasse Houses. However, as plans were being processed, many more costly changes were made; in some instances these were proposed by ourselves and in other instances, they were required by the State Division of Housing.

During these past two years, we have also witnessed a sharp increase in costs, primarily in the mechanical trades, due to more than average increases in labor and uncertainty as to cost of materials. A prime example is the wide fluctuation in the cost of copper which has had a direct impact on the sizable increases in both electrical and plumbing work.

Because of the time required to settle our site plan with the appropriate city agencies, we were unable in many instances to finalize contract negotiations with contractors and were caught in the general inflationary period, reflecting itself in higher costs.

All of the three reasons listed above have made it necessary for us to make formal application for an increase in the mortgage from $250, 900, 000 to $261, 000, 000 or $10, 100, 000.

We are enclosing a schedule showing a breakdown of estimated costs as of June 1965 totalling $258, 507, 750; this is the figure shown on Schedule A of our approved application under the category of construction costs. We have listed in the second column of the schedule the revised trade payment breakdown which now incorporates all of our figures based on the present site plan and in most instances, contracts with subcontractors. The total is now $267, 830, 750 or an increase of $9, 323, 000 in construction costs.

The balance of $777, 000 of additional costs is made up of the following adjustments:

Architectural fees	$200, 000
Selling expense	50, 000
Housing company administration	50, 000
Government agency fee - supervision	101, 000
Financing expense	20, 200
Interest during construction	250, 000
Taxes during construction	100, 000
Title and recording fees	13, 000
Working capital	94, 918
Reduction in land cost	(94, 468)
Increase in equity	(7, 650)
	$777, 000

The increase in construction costs of $9, 323, 000 and the adjustments in other costs of $777, 000 make up the additional $10, 100, 000 which we are requesting.

An analysis of the net increase in construction costs is as follows:

A. Changes in Residential Buildings

1. Changes due to the new site plan, which now includes the town houses and the new locations of the high-rise buildings. In addition, we have raised the first floors of all of the high-rise buildings to provide open plazas.

Excavation	$ 500, 000	
Foundations	1, 400, 000	
Superstructure	2, 600, 000	
Masonry	700, 000	
Roofing	850, 000	
		$6, 050, 000

2. Increases in mechanical trades, over and above labor and material costs, have been caused by elimination of skip-stop elevators, bell and telephone intercommunications from apartments to lobby, added insulation of vertical risers, water pressure reducing valves on lower floors of high-rise buildings, lightning protection, Fire Department regulations re fire fighting apparatus and other lesser changes.

Plumbing	$3, 250, 000	
Electrical	3, 000, 000	
Elevators	800, 000	
Air conditioning units	700, 000	
Heating and air conditioning	(250, 000)	
		7, 500, 000

3. Changes in plans to pre-finished and additional kitchen cabinets, floor to ceiling bi-fold closet doors, additional sound insulation between apartments, elimination of plastering on ceilings and the substitution of heavy-duty paint.

Carpentry	$ 700, 000	
Millwork	2, 400, 000	
Painting	1, 600, 000	
Plastering and lathing	(2, 500, 000)	
		2, 200, 000

4. All remaining changes in our trade payment breakdown for the residential buildings are as follows:

Increases	
Additional flooring	$ 100,000
Windows	250,000
Balcony doors	160,000
Steel lintels	500,000
Iron work	450,000
Tile	50,000
Refrigerators	50,000
Terrazzo	200,000
Caulking	100,000
Incinerators	300,000
Temporary roads and misc.	650,000
	$2,810,000

Reductions	
Setting windows	$ 25,000
Glass and lobby fronts	90,000
Steel doors and bucks	300,000
Balcony and roof railings	150,000
Ranges	175,000
Venetian blinds	15,000
Medicine cabinets	70,000
Window cleaning	50,000
TV and intercom system (included in electrical work)	150,000
Direct labor	200,000
Reduction of contingencies	1,428,000
	$2,653,000

Net increase, miscellaneous items 157,000

The net increase, therefore, in the residential building category is: $15,907,000

B. Changes in All Categories other than Residential Buildings

1.	Commercial and Community Space	$ 200,000
2.	Garages - Savings are primarily due to a change from nine to eight garages, as well as a reduction of approximately 5% in space per car.	(4,200,000)
3.	Site Work and Landscaping	500,000
4.	Power Plant - Savings are primarily due to elimination of electric generating on premises.	(3,784,000)
5.	Piles for Residential Buildings and Garages	(300,000)
6.	Site Fill - We are now estimating about 4,500,000 yards of fill as against the original estimate of 4,000,000 yards.	750,000

7.	Test Borings	100,000
8.	Premium on Bonds	150,000
	Net Savings	($ 6,584,000)

When these savings are applied against the additional costs of the residential buildings, we have a net increase in construction costs of $9,323,000.

Effect on Carrying Charges (Schedule B)

The increase in the mortgage, of and by itself, would require an increase of approximately ninety cents per room per month.

However, during the past two years since the original Schedule B was adopted, other changes have become necessary as follows:

A. Expenses

1. Increase in Debt Service $ 897,446

The original debt service factor was calculated at .04906 which produced a dollar amount of $12,309,154. The new debt factor, based on a 4% interest rate and a mortgage of $261,000,000 is $13,206,600.

2. Government Agency Charge (225,650)

The original government agency charge was $878,150 based on .0035 of the mortgage. The new government agency charge is $652,500 based on .0025.

3. New York State and City Corporation Taxes 147,000

Since July of 1966 there has been levied a new New York City corporation tax which will require an additional annual payment of $73,500. (The State tax was classified previously under Maintenance and Operations.)

4. Real Estate Taxes 260,746

The original computation for real estate taxes was based on a 50% abatement of full development costs at a 5.04 rate. This amounted to $7,081,754.

Based on recent experience with the Tax Commission relative to negotiations for Rochdale Village we are recomputing our real estate taxes on the following basis: full taxes on $5,000,000 of commercial property, 50% abatement on 90% of balance of development cost, rate of 5.5. This produces a figure for real estate taxes of $7,342,500.

5. Reserve for Replacements 355

There has been an increase from $349,295 to $349,650 based on a change in room count from 69,859 to 69,930 or 71 additional rooms at $5 per room.

Schedule C
Riverbay Corporation

-5-

6. Maintenance and Operations — 236,416

The original figure for maintenance and operations, at the rate of $68.49 per rental room, equalled $4,784,788. Due to increases primarily in salaries, we are projecting a per room cost of $71.80 or a total of $5,021,204. (This increase of $236,416 in Maintenance and Operations is actually greater by $72,500 since that amount was previously included here to cover the New York State corporation tax and has now been reclassified under Item 3 above.)

Our total expenses have to be increased from $25,403,141 to $26,719,454 or: — $ 1,316,313

B. Income other than Residential

1. Garage Income — $ (369,225)

We have reduced the cost of rental of garage space from $17.50 to $15 per month, or a change from $2,164,575 to $1,855,350.

2. Professional Apartments — (10,000)

We have added a 10% allowance for vacancies, reducing the professional apartment income from $100,000 to $90,000.

3. Commercial Income — (320,000)

The commercial area has been reduced from 250,000 square feet at $4.00 per foot with 5% vacancy allowance to 200,000 square feet at $3.50 per foot and 10% vacancy allowance. Income has been reduced from $950,000 to $630,000.

4. Interest on Deposits — 175,000

We have added to Other Income the amount of $175,000 in interest earned annually on deposits in Debt Service and Operating Escrow Funds.

5. Income from Utilities — (16,896)

Reduced from $2,046,000 to $2,029,104.

6. Income from Laundry Rooms — ---

Remains $500,000.

The total of all other income therefore has been reduced from $5,760,575 to $5,279,454 or: — $ (481,121)

We are requesting a reduction of our allowance for vacancies and contingencies from the original 2 1/2% or $491,064 to 2% or $428,800., a reduction of $62,264.

350a

EXHIBIT "27" - SCHEDULE A AND FINANCIAL ESTIMATES, DATED MARCH 29, 1968 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE A

Date: 3-29-68

Name of Project RIVERBAY CORPORATION (X) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

MCLP # 64-571

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) cost per Rental Room
1. COST OF LAND ACQUISITION CITY OF NEW YORK		170,250		
a. No. of sq. ft. 12,967,785 @ $ 1.20 per sq. ft.		$15,561,342		
b. Carrying Charges & Expenses		$ 487,390		
c. Relocation and Other National Development Corp		$ (200,000)	$16,018,982	$ 220
2. CONSTRUCTION COSTS				
a. ~~Demolition & Site Improvement Costs~~ Site Fill	$ 6,850,000			
b. Abnormal Foundations & Conditions- Piles	$ 7,200,000			
c. Residential Structures	$199,735,000			
d. Commercial Structures (If separate) and Community Bldgs.	$ 9,850,000			
e. Garages Structures (If separate)	$ 12,800,000			
f. Other Structures Power Plant	$ 22,216,000			
g. Site work	$ 5,000,000			
h. Off-site work	$ 2,829,750			
i. Premium on bonds	$ 850,000	$267,730,750		
j. Contractor's Overhead- 0.84%	400,000			
k. For overhead ____% of Items 2a.-i.		2,250,000	$269,980,750	$ 3,704
3. DEVELOPMENT FEE ____% of Items 2a.-i.			$	$
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,550,000		
b. Engineer's Inspection Fees		$ 350,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 200,000		
e. Preliminary Surveys		$ 400,000		
f. Legal Fees		$ 170,000	$ 3,870,000	$ 53
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 500,000		
b. Advertising & Promotion		$		
c. Other		$	$ 500,000	$ 7
6. CARRYING & FINANCING CHARGES				
a. Interest @ ____% for ____Months		$6,500,000		
b. R.E. Tax @ ____% for ____Months on A.V. ____		$2,600,000		
c. Supervising Governmental Agency Fee 0.6% of 11+250M		$1,816,000		
d. ~~Financing Expenses~~ I.F.A. Fee 0.3% of 11		$ 783,000		
e. Title and Recording Expenses		$ 353,000		
f. G. Administrative Expenses		250,000		
g. Surplus from Pre-Occupancy Operations		$ (10,000,000)	$ 2,302,000	$ 32
7. ESTIMATED DEVELOPMENT COST			$292,671,732	$ 4,016
8. CONTINGENCY - ____% of Item 7.			$ 100,000)	
9. WORKING CAPITAL - ____% of Item 7.			$ 1,031,468	15
10. ESTIMATED PROJECT COST			$293,803,700	$ 4,031
11. MAXIMUM MORTGAGE LOAN - 88.83% of Item 10.			$261,000,000	3,581
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$ 32,803,200	$ 450
a. 1. No. of Class A Shares ____ x (Par Value) $ ____			$	
2. No. of Class B Shares 312,128 x (Par Value) $25.00		$ 32,803,200		
b. Income Debentures (Interest at ____%)		$	$ 32,803,200	
c. Capital Contribution			$	

No. of H.U. 15,372 — No. of Rental Rooms 72,896

Cost per H.U. $ 19,039 (Item 7, Col. 3 ÷ No. of H.U.) — Cost per Rental Room $ 4,016 (Item 7, Col. 4)

HFA-LPM-2.34 (4-66)

EXHIBIT "27"

FINANCIAL ESTIMATES
OF
RIVERDAY CORPORATION (CO-OP CITY)
A LIMITED PROFIT (NON-PROFIT) HOUSING PROJECT

Project No. 64-57
Date 3-29-68

Located at NEW ENGLAND THRUWAY & HUTCHINSON RIVER

County of)
Town of) BRONX, N. Y.
Borough of)

Block No.: 5135, 5141 Lot No.: 51, 100

(X) Cooperative (Mutual) ( ) Rental ( ) Non-Profit

PROJECT STATISTICS

Proposed zoning R-6
No. of housing units 15,372
No. of rental rooms 72,896
Average rental rooms per H.U. 4.74
Total parking 10,850

Total land area 13,107,200 sq. ft. 300.9 acres
Net land area 9,186,800 sq. ft. 210.9 acres
Land coverage 1,650,000 sq. ft. 18 % total
Density 278 persons per acre
Ratio of parking to H.U.'s 70.6 %

Types of Structures	No. of Bldgs.	No. of Stories of Each	No. of Elevators of Each	Sq. Ft. Area (Typical Fl.)	Cubage of Each
Residential Triple Core	10	60	6	29,700 per bldg.	2,970,000
Chevron	10	24	4	20,610 " "	4,438,000
Tower	15	33	4	15,500 " "	4,600,000
Town Houses	236	3	-	2,465 total bldg. fls.	28,000
Commercial S.C. Bldg.	1	1 & 2	2	236,000 " " "	3,300,000
S.C. Bldgs.	2	1 & 2	1	114,000 " " "	1,508,000
Garage	8	6 & Roof	2	59,718	2,970,000
Boiler Plant & Cooling Tower,	1	1	- -	52,650	2,393,000
				13,400	720,000
Total					211,369,000

APARTMENT DISTRIBUTION

Apartment Type	Housing Units	Rental Rooms Per Unit	Rental Rooms Total	Distribution %	Max. No. of Persons per H.U.	Maximum No. of Persons
a 1 Bed Room	3850	3.5	13,510	25.0	2	7,720
1 Bed Room w/balcony	1676	4.0	6,704	11.0	2	3,352
2 Bed Rooms	3920	4.5	17,640	25.5	4	15,660
b 2 Bed Room w/balcony	1800	5.0	9,000	12.0	4	7,200
c 3 Bed Room	1650	6.0	9,960	11.0	6	9,950
3 Bed Room w/balcony	2220	6.5	14,430	14.0	6	13,320
d 3 Bed Room w/dining L.R.Combo	236	7.0	1,652	1.5	6	1,416
Professional	29	4.5	—	—	—	—
Superintendent	10 1	5.5 4.5	—	—		
TOTALS	15,412		72,896	100%	—	58,648

SUMMARY OF ESTIMATED COSTS

ESTIMATED TOTAL DEVELOPMENT COST	$292,671,732
WORKING CAPITAL AND CONTINGENCY	$ 1,131,468
TOTAL ESTIMATED PROJECT COST	$293,803,200
MAXIMUM MORTGAGE LOAN	$261,000,000
EQUITY CAPITAL REQUIREMENTS OR CAPITAL CONTRIBUTION	

a. 1. _____ (No. of Class A Shares) X $_____ (Par Value) = $.....

2. 1,312,128 (No. of Class B Shares) X $25.00 (Par Value) = $32,803,200

b. Income debenture (_____ % interest) $.....
c. Capital contribution $_____ $32,803,200.

MAXIMUM AVERAGE RENT OR CARRYING CHARGE (Excluding Utilities) PER MONTH

$25.00 Per Residential Rental Room

RFA-LPH-2.2 (4-66)

BEST COPY AVAILABLE

SCHEDULE A 9/15/69

Date: 9-15-69

Name of Project: RIVERDAY CORPORATION (HOUSING) (X) Cooperative ( ) Rental ( ) Non Profit

Address of Project: BRONX, NEW YORK

SCLP # 64-57

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) Cost per Rental Room
1. COST OF LAND ACQUISITION - City of New York		170,250		
a. No. of sq. ft. 12,967,785 @ 1.20 per sq. ft.		$ 15,561,342		
b. Carrying Charges & Expenses		$ 187,390		
c. Relocation and Other National Development Corp		$ (200,000)	$ 16,018,082	$ 220
2. CONSTRUCTION COSTS				
a. Demolition & Site Clearance Costs	Site Fill $ 7,450,000			
b. Abnormal Foundations & Conditions (Piles)	$ 9,055,000			
c. Residential Structures	$ 229,065,250			
d. Commercial Structures (if separate)	and Community Space $ 14,500,000			
e. Garages Structures (if separate)	$ 13,650,000			
f. Other Structures Power Plant	$ 29,350,000			
g. Site Work	$ 5,500,000			
h. Off-Site Work	$ 2,829,750			
i. Provision for Parks	$ 950,000	$307,750,000		
j. Test Housing Contingency Overhead 1/2% of Items 2a-i .89%	$ 400,000	$ 2,750,000	$310,500,000	$ 4,259
3. DEVELOPMENT FEE ____% of Items 2a-i			$	$
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,975,000		
b. Engineer's Inspection Fees		$ 975,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 100,000		
e. Preliminary Surveys		$ 1,450,000		
f. Legal Fees		$ 200,000	$ 5,900,000	$ 81
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 600,000		
b. Advertising & Promotion		$		
c. Other		$	$ 600,000	$ 8
6. CARRYING & FINANCING CHARGES				
a. Interest @ ____% for ____ Months		$ 18,500,000		
b. R.E. Tax @ ____% for ____ Months on A.V. ____		$ 7,900,000		
c. Supervising Governmental Agency Fee		$ 2,970,000		
d. Financing Expenses		$ 990,000		
e. Title and Recording Expenses		$ 453,000		
f. M.C. Administrative Expenses		300,000		
g. Surplus from Preoccupancy	$	(4,600,000)		
h. Accounting Expenses	$	$	$ 26,513,000	$ 364
7. ESTIMATED DEVELOPMENT COST			$359,531,082	$ 4,932
8. CONTINGENCY - ____% of Item 7.			$ 1,000,000)	13
9. WORKING CAPITAL - ____% of Item 7.			$ 2,167,718)	
10. ESTIMATED PROJECT COST			$362,699,700	$ 4,975
11. MAXIMUM MORTGAGE LOAN - 90.98% of Item 10			$330,000,000	4,527
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$ 32,699,700	$ 448
a. 1. No. of Class A Shares ____ x (Par Value) $____			$	
2. No. of Class B Shares) 307,988 x (Par Value) $25.00		$ 32,699,700		
b. Income Debentures (Interest at ____%)		$	$	
c. Capital Contribution			$	

No. of H.U. 15,372 No. of Rental Rooms 72,896

Cost per H.U. $ 23,380. (Item 7, Col. 3 ÷ No. of H.U.)

Cost per Rental Room $ 4,930. (Item 7, Col. 4)

RFA-LPH-2.24 (4-68)

EXHIBIT "28" - SCHEDULES A, B & C, DATED SEPTEMBER 15, 1969 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE B

Name of project RIVERDAY CORPORATION (CO-OP CITY) Date of schedule 9-15-69

(X) Cooperative ( ) Rental ( ) Non-Profit

Residential rental rooms 72,800 including 2,900 balconies

ESTIMATED ANNUAL EXPENSES AND INCOME

COMPUTATION OF ASSESSED VALUATIONS:

Assessed valuation of land — Shelter Rent Tax
Assessed valuation of building(s) $
Total assessed valuation $
Tax exemption C _____ %
of totals $

Net taxable assessment $

TERMS AND CONDITIONS OF MORTGAGE:

Mortgage interest rate 6 %
term 40 years

Maximum mortgage loan $330,000,000
Debt service factor 6.6

	(1)	(2)
1. CARRYING CHARGES & OPERATING EXPENSES		
a. Interest and amortization on mortgage		$21,780,000
b. Governmental agency charge .25 %		$ 825,000
c. Governmental agency supervision fee		$
d. N.Y.S. franchise taxes (and ~~federal income tax~~) N.Y.C. Corp. Tax		$ 204,000
e. Real estate taxes		
i. (1) Municipal taxes @ ____ % on net A.V. Commercial	$ 300,000.	
(2) Assessment for local improvements @ ____ % on total A.V. Shelter Rent Tax	$ 2,485,000.	
ii. Other local taxes	$ -	$ 2,785,000
f. Maintenance & operations $ 82.00 per rental room per year (69,930)		$ 5,734,500
g. Reserves for painting & decorating $ ____ per rental room per year		$
h. Reserves for replacement $ 5.00 per rental room per year		$ 349,500
i. Return on equity capital		
i. ____ % on $ ____ of shares	$	
ii. ____ % on $ ____ of debentures	$ ____	$
j. Other expenses (specify)		$ ____
TOTAL		$31,678,000
2. DEDUCT: NON-HOUSING INCOME		
a. Parking income		
i. 10,850 indoor spaces @ $ 207.00 per year		
less 5 % vacancy loss equals net indoor rent	$ 2,133,652.	
ii. ____ outdoor spaces @ $ ____ per year		
less ____ % vacancy loss equals net outdoor rent Transient Parking	$ 150,000.	
b. Income from other sources		
i. Washing & vending machines @ $ ____ per M.U. per year x no. of M.U. ____	$ 500,000.	
ii. Professional spaces $ 120,000 per year		
less 10 % vacancy loss equals	$ 108,000.	
iii. Commercial spaces $ 1,000,000 per year		
less 10 % vacancy loss equals	$ 900,000.	
c. Other income (specify) TOTAL 2,429,104		$ 6,220,756.
3. NET ANNUAL EXPENSE (Exclusive of allowance for vacancies and contingencies and tenants' utilities)		$25,457,244
Total #1 less Total #2		
4. ADD: Allowance for vacancies and contingencies (1 % of Item 3.)		$ 254,572
5. TOTAL NET ANNUAL EXPENSE		$25,711,816

Net income to be derived from housing units exclusive of tenants' utilities.

HOUSING RENT OR CARRYING CHARGE PER MONTH

	Exclusive of Utilities	Utilities	Total
Per rental room	$ 29.39	$ 2.32	$ 31.71
Per housing unit	$139.21	$11.00	$150.21

2.c. Other Income

Cost of Utilities included in M & O and included in Carrying Charge 15,372 DU's @ $11.00 per month — $2,029,104.

Interest Earned on Debt Service and Escrow Fund Deposits — 400,000.

$2,429,104.

RFA-LPm-2.2a (4-65)

SCHEDULE A

Date: 9-15-69 (HOUSING & EDUCATION PLAN)

Name of Project RIVERDAY CORPORATION ( ) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

RCLP #

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) cost per Rental Room
1. COST OF LAND ACQUISITION - City of New York		170,250		
a. No. of sq. ft. 12,907,755 @ 1.20 per sq. ft.		$15,561,342		
b. Carrying Charges & Expenses		$ 487,390		
c. Relocation and Other National Development Corp.		$ (200,000)	$16,018,982	$
2. CONSTRUCTION COSTS Site Fill				
a. Construction & Structural Costs	$ 7,450,000			
b. Abnormal Foundations & Conditions (Piles)	$ 9,055,000			
c. Residential Structures	$229,055,250			
d. Commercial Structures (If separate) Info Community Space	$ 14,500,000			
e. Garages Structures (If separate)	$ 13,650,000			
f. Other Structures Power Plant	$ 29,350,000			
g. Site Work	$ 5,500,000			
h. Off-Site Work	$ 2,829,750			
i. Fixtures on Beds	$ 1,105,000	$306,929,275		
j. Rent Premiums Including Allowance	400,000			
k. School Buildings Items 2a-j.	39,019,275	$ 3,141,743	$350,000,018	$
l. Contractors Overhead				
3. CONTINGENCY FEE ____ % of Items 2a-l			$ 63,703	$
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,975,000		
b. Engineer's Inspection Fees		$ 975,000		
c. Laboratory Fees		$ 300,000		
d. Soil Investigation		$ 100,000		
e. Preliminary Surveys		$ 1,450,000		
f. Legal Fees		$ 242,500	$ 6,042,500	$
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 600,000		
b. Advertising & Promotion		$		
c. Other		$	$ 600,000	$
6. CARRYING & FINANCING CHARGES				
a. Interest @ ____ % for ____ Months		$ 22,120,000		
b. R.E. Tax @ ____ % for ____ Months on A.V. ____		$ 8,350,000		
c. Supervising Governmental Agency Fee		$ 3,290,000		
d. Financing Expenses		$ 1,128,000		
e. Title and Recording Expenses		$ 518,000		
f. M.C. Administrative Expenses		372,000		
g. Surplus Xpns. Preoccupancy	$	(4,000,000)		
h. Accounting Expenses	$	$	$ 31,208,000	$
7. ESTIMATED DEVELOPMENT COST			$403,999,298	$
8. CONTINGENCY - ____ % of Item 7.			$ 2,552,779	
9. WORKING CAPITAL - ____ % of Item 7.			$ 2,147,718	
10. ESTIMATED PROJECT COST			$408,699,795	$
11. MAXIMUM MORTGAGE LOAN - 92 % of Item 10			$376,000,000	
12. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$ 32,699,795	$
a. 1. No. of Class A Shares 1,307,988 x (Par Value) $ 25.00			$32,699,700	
b. No. of Class B Shares ____ x (Par Value) $ ____			$	
c. Income Debentures (Interest at ____ %)		$	$	
d. Capital Contribution			$	

No. of M.U. ____ No. of Rental Rooms ____

Cost per M.U. $ ____ (Item 7, Col. 3 ÷ No. of M.U.) Cost per Rental Room $ ____ (Item 7, Col. 4)

RFA-LPm-2.2a (4-65)

BEST COPY AVAILABLE

SCHEDULE B

Name of project RIVERBAY CORPORATION Date of schedule 9-15-69

(X) Cooperative ( ) Rental ( ) Non-Profit

Residential rental rooms 72,896 including 2,966 balconies

ESTIMATED ANNUAL EXPENSES AND INCOME

COMPUTATION OF ASSESSED VALUATION:

Assessed valuation of land	$ 14,400,000	
Assessed valuation of building(s)	$311,600,000	
Total assessed valuation	$326,000,000	
Tax exemption @ 50 %		
of $19,000,000 of totals	$159,500,000	
Comml. 7,000,000		
Net taxable assessment	$166,500,000	

TERMS AND CONDITIONS OF MORTGAGE:

Mortgage interest rate 6 %
term 40 years

Maximum mortgage loan $330,000,000

Debt service factor 6.6

	(1)	(2)
1. CARRYING CHARGES & OPERATING EXPENSES		
a. Interest and amortization on mortgage		$21,780,000
b. Governmental agency charge _____ %		$ 825,000
c. Governmental agency supervision fee		$
d. N.Y.S. franchise taxes (and federal income tax)		$ 204,000
e. Real estate taxes		
i. (1) Municipal taxes @ 6.4 % on net A.V.	$10,656,000	
(2) Assessment for local improvements @ _____ % on total A.V.	$	
ii. Other local taxes	$	$10,656,000
f. Maintenance & operations $ 82.00 per rental room per year (69,930)		$ 5,734,500
g. Reserves for painting & decorating $ _____ per rental room per year		$
h. Reserves for replacement $ 5.00 per rental room per year		$ 349,500
i. Return on equity capital		
i. _____ % on $ _____ of shares	$	
ii. _____ % on $ _____ of debentures	$	$
j. Other expenses (specify)		
TOTAL		$39,549,000
2. DEDUCT: NON-HOUSING INCOME		
a. Parking income		
i. 10,850 indoor spaces @ $ 207 per year less 5 % vacancy loss equals net indoor rent	$2,133,652	
ii. _____ outdoor spaces @ $ _____ per year less _____ % vacancy loss equals net outdoor rent (Transient Parking)	$ 150,000	
b. Income from other sources		
i. Washing & vending machines @ $ _____ per H.U. per year x no. of H.U. _____	$ 500,000	
ii. Professional spaces $ 120,000 per year less 10 % vacancy loss equals	$ 108,000	
iii. Commercial spaces $ 1,000,000 per year less 10 % vacancy loss equals	$ 900,000	
c. Other income (specify)	TOTAL 2,504,104	$ 6,295,756
3. NET ANNUAL EXPENSE (Exclusive of allowance for vacancies and contingencies and tenants' utilities)		$33,253,244
Total #1 less Total #2		
4. ADD: Allowance for vacancies and contingencies (1 % of item 3.)		$ 332,532
5. TOTAL NET ANNUAL EXPENSE		$33,585,776

Net income to be derived from housing units exclusive of tenants' utilities.

HOUSING RENT OR CARRYING CHARGE PER MONTH

	Exclusive of Utilities	Utilities	Total
Per rental room	$ 38.39	$ 2.32	$ 40.71
Per housing unit	$181.84	$11.00	$192.84

2.c. Other Income

Cost of Utilities included in M & O and included in Carrying Charge 15,372 DU's @ $11.00 per month	$2,028,104
Interest Earned on Debt Service and Escrow Fund Deposits	475,000
	$2,503,104

BFA-LPA-2.2a (4-66)

SCHEDULE B

Name of project RIVERBAY CORPORATION (CO-OP CITY) Date of schedule 9-25-69

(X) Cooperative ( ) Rental ( ) Non-Profit

Residential rental rooms 72,896 including 2,966 balconies

ESTIMATED ANNUAL EXPENSES AND INCOME

COMPUTATION OF ASSESSED VALUATION:

Assessed valuation of land	$ Shelter Rent Tax	
Assessed valuation of building(s)	$ _____	
Total assessed valuation	$	
Tax exemption @ _____ %		
of totals	$	
Net taxable assessment	$	

TERMS AND CONDITIONS OF MORTGAGE:

Mortgage interest rate 6 %
term 40 years

Maximum mortgage loan $330,000,000

Debt service factor 6.6

	(1)	(2)
1. CARRYING CHARGES & OPERATING EXPENSES		
a. Interest and amortization on mortgage		$21,780,000
b. Governmental agency charge _____ 25 %		$ 825,000
c. Governmental agency supervision fee		$
d. N.Y.S. franchise taxes (and federal income tax) N.Y.C. Corp. Tax		$ 204,000
e. Real estate taxes		
i. (1) Municipal taxes @ _____ % on net A.V. Commercial	$ 300,000.	
(2) Assessment for local improvements @ _____ % on total A.V. Shelter Rent Tax	$ 2,485,000.	
ii. Other local taxes	$	$ 2,785,000
f. Maintenance & operations $ 82.00 per rental room per year (69,930)		$ 5,734,500
g. Reserves for painting & decorating $ _____ per rental room per year		$
h. Reserves for replacement $ 5.00 per rental room per year		$ 389,500
i. Return on equity capital		
i. _____ % on $ _____ of shares	$	
ii. _____ % on $ _____ of debentures	$	$
j. Other expenses (specify)		
TOTAL		$31,678,000
2. DEDUCT: NON-HOUSING INCOME		
a. Parking income		
i. 10,850 indoor spaces @ $ 207.00 per year less 5 % vacancy loss equals net indoor rent	$2,133,652.	
ii. _____ outdoor spaces @ $ _____ per year less _____ % vacancy loss equals net outdoor rent (Transient Parking)	$ 150,000	
b. Income from other sources		
i. Washing & vending machines @ $ _____ per H.U. per year x no. of H.U. _____	$ 500,000	
ii. Professional spaces $ 120,000 per year less 10 % vacancy loss equals	$ 108,000	
iii. Commercial spaces $ 1,000,000 per year less 10 % vacancy loss equals	$ 900,000	
c. Other income (specify)	TOTAL 2,429,104	$ 6,220,756
3. NET ANNUAL EXPENSE (Exclusive of allowance for vacancies and contingencies and tenants' utilities)		$25,457,244
Total #1 less Total #2		
4. ADD: Allowance for vacancies and contingencies (1 % of item 3.)		$ 254,572
5. TOTAL NET ANNUAL EXPENSE		$25,711,816

Net income to be derived from housing units exclusive of tenants' utilities.

HOUSING RENT OR CARRYING CHARGE PER MONTH

	Exclusive of Utilities	Utilities	Total
Per rental room	$ 29.39	$ 2.32	$ 31.71
Per housing unit	$139.21	$11.00	$150.21

2.c. Other Income

Cost of Utilities included in M & O and included in Carrying Charge 15,372 DU's @ $11.00 per month	$2,028,104.
Interest Earned on Debt Service and Escrow Fund Deposits	400,000.
	$2,428,104.

BFA-LPA-2.2a (4-66)

EXHIBIT "28" - SCHEDULES A, B & C, DATED SEPTEMBER 15, 1969 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION (CO-OP CITY) HCLr .68-571

SCHEDULE C

Calculation of Pre-occupancy Date Net Income as of 9/15/69

(000 Omitted)

RENT INCOME

Section #	Initial Occupancy Date	Annual Rent	1969	1970	1971	1972	Total
I	1/69 (12/10/68)	$4,587	$2,451	$ 4,465	$ 4,587	$ 4,587	
II	9/69	3,694	240	2,659	3,694	3,694	
III	1/70	2,943	- -	2,364	2,943	2,943	
IV	12/70	4,105	- -	283	3,856	4,105	
V	7/71	6,537	- -	- -	1,507	6,537	
		$21,866	$2,691	$ 9,791	$16,587	$21,866	$50,935
17.5% Increase (excluding utilities) will go in effect as of 7/1/70				856	2,903	3,827	7,586
TOTAL RENT INCOME			$2,691	$10,647	$19,490	$25,693	$58,521

OCCUPANCY EXPENSE

M & O	$5,735					
Less: Utilities	2,029					
Net M & O	$3,706	$ 900	$ 2,200	$ 3,000	$ 3,706	9,806
						$48,715

OTHER INCOME

Gross	$6,220					
Less: Utilities	2,029					
	$4,191	$ 500	$ 1,600	$ 3,350	$ 4,191	9.641
						$58,356
Less: Agency Fee						2,106
						$56,250

APPLICATION OF NET PRE-OCCUPANCY DATE NET INCOME (000 Omitted)

	Gross	Applied To Operations	Schedule A	Schedule A (Rounded)
(a) Interest	$62,594	$44,037	$18,557	$18,500
(b) Taxes	15,482	7,619	7,863	7,900
(c) Net Operating Income	56,250	4,594	(4,594)	(4,600)
		$56,250		

352a

Computation of Shelter Rent

Schedule C

(Following Items from Schedule B)

Total Item 1		$31,678,000
Less: Item 1.e.		2,785,000
		$28,893,000
Add: Item 4		254,572
		$29,147,572
Deduct:		
2.a. 1 & 2	$2,283,652	
b. 1	500,000	
II	108,000	
III 900,000		
Less R.E.Tax 300,000	600,000	
c. Utilities- G.& E.	2,029,104	
Heat & Air Cond.@ $18	1,258,000	6,778,756
Tax Base		$22,368,816

Shelter Rent Tax Computation $\frac{22,368,816}{9}$ = $ 2,485,424

BEST COPY AVAILABLE

RIVERBAY CORPORATION (CO-OP CITY) HCLP #64-571

SCHEDULE C

Calculation of Real Estate Taxes During Development
as of 9/15/69
(000 Omitted)

	Rate	7/1/65-6/30/69	7/1/69-6/30/70	7/1/70-6/30/71 5.8%	7/1/71-6/30/72 6.1%	7/1/72-12/31/72 6.4%	Total
Taxes Paid (net) to 6/30/69		$4,315					
Bills on Hand (as adj. for 50% abatement)			$3,150				
1970/71							
Sect. I Complete	$32,000			$1,856	$1,952		
II	22,800			1,322	1,391		
III	18,700			1,085	1,141		
Work in Process	25,000			1,450			
1971/72							
Sect. IV Complete	$24,000				1,464		
Work in Process	25,000				1,525		
1972/73							
Job Complete	$133,500					4,272	
		$4,315	$3,150	$5,713	$7,473	$4,272	$24,923
Substitute:							
Shelter Rent Tax Formula Effective 1/1/71				$(1,856)	$(1,952)		
				(1,322)	(1,391)		
				(1,085)	(1,141)		
7/1/70 - 12/31/70	$\frac{10,647}{2} \times 10$			532	(1,464)	(4,272)	
1/1/71 - 12/31/71				975	975		
1/1/72 - 12/31/72					1,280	1,280	
		$4,315	$3,150	$2,957	$3,780	$1,280	$15,482

RIVERBAY CORPORATION

SCHEDULE C

Projected Interest Cost
(000 Omitted)

Principal Amt		5/1/68-5/1/69	5/1/69-5/1/70	5/1/70-5/1/71	5/1/71-5/1/72	5/1/72-11/1/72	11/1/72-12/31/72	Total	
$71,600	Bonds @ 5.2%	$ 4,768	$4,768	$ 4,768	$4,768	$2,384	$ 795	$22,251	
30,000	Bonds @ 6% (11/1/69)	- -	2,400	4,800	4,800	2,400	800	15,200	
80,000	Bonds @ 6% (5/1/70)	- -	- -	4,800	4,800	2,400	800	12,800	
50,000	Outstanding BAN (Cumulative to 5/1/69)	12,750	- -	- -	- -	- -	- -	12,750	
50,000	BAN - 12/1/69 - 5/1/70 @ 6½%	- -	650	- -	- -	- -	- -	650	
50,000	BAN - 9/15/69 - 9/15/70 @ 6½%	- -	- -	1,950,000	- -	- -	- -	1,950	
65,000	5/1/70 - 12/31/72 @ 6.5%	- -	- -	- -	- -	- -	11,267	11,267	
	TOTAL ESTIMATED INTEREST EXPENSE								$76,868
Interest Income									
7/31/69 Cash & Invest	$19,435,000 for ½ mo. @ 7% (½)	- -	$ 226	- -	- -	- -	- -	$ 226	
Earnings to 7/31/69:									
BAN		$6,375							
Premium on BAN		7							
MIL		1							
Good Faith Deposit		2							
Capitalized Interest		204							
Premium & Accrued Interest on Bonds		359							
Escrow Earnings		163							
		$7,111	- -	- -	- -	- -	- -	7,111	
Interest on Capital Interest from 5/1/68 @ 6½%:									
2,334 to 10/29/69 x 1½		- -	224	- -	- -	- -	- -	224	
4/28/70 x 2		- -	298	- -	- -	- -	- -	298	
10/29/70 x 2½		- -	- -	372	- -	- -	- -	372	
4/28/71 x 3		- -	- -	448	- -	- -	- -	448	
10/29/71 x 3½		- -	- -	- -	522	- -	- -	522	
20,000 BAN	½ x 7% for 4 months	- -	233	- -	- -	- -	- -	233	
30,000 BAN	½ x 7%	- -	- -	350	- -	- -	- -	350	
65,000 BAN	½ x 7%	- -	- -	- -	- -	- -	2,275	2,275	
40,000 Escrow	11/1/69-6/1/70 7 mos. @ 7%	- -	- -	- -	2,215	- -	- -	2,215	
	TOTAL ESTIMATED INTEREST INCOME								14,274
	NET INTEREST COST								$62,594

EXHIBIT "29" - SCHEDULES A, B & C, DATED MAY 1, 1971 - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

SCHEDULE A

Date: 5-1-71

Name of Project RIVERBAY CORPORATION (HOUSING) (X) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, NEW YORK

BCLP # 64-571

BCNP # _____

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) Cost per Rental Room
1. COST OF LAND ACQUISITION				
a) City of New York		$ 170,250		
b) 12,967,785 @ $1.20 sq. ft.		15,561,342		
c) Carrying Charges & Expenses		487,390	$ 16,018,982	$ 220,...
d) National Development Corp.		(200,000)		
2. CONSTRUCTION COSTS				
a. Site Fill	$ 7,900,000			
b. Piles	$ 8,930,000			
c. Residential Structures	$238,269,000			
d. Comm'l. & Community Space	$ 18,950,000			
e. Garage Structures	$ 15,000,000			
f. Power Plant & Dist.System	$ 27,200,000			
g. Site Work	$ 13,571,250			
h. City Site Work	$ 3,629,750			
i. Insurance & Prem.on Bonds	$ 3,600,000	$337,450,000		
j. Test Borings	400,000			
k. Contractors Overhead		3,050,000	$340,500,000	$ 4,671...
3. DEVELOPMENT FEE _____ % of Items 2a.-i.			$ ...	$ ...
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,975,000		
b. Engineer's Inspection Fees		$ 975,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 100,000		
e. Preliminary Surveys		$ 1,450,000		
f. Legal Fees		$ 210,000	$ 5,910,000	$ 81...
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 600,000		
b. Advertising & Promotion		$ ...		
c. Other		$ ...	$ 600,000	$ 8...
6. CARRYING & FINANCING CHARGES				
a. Interest @ _____% for _____Months (Net)		$71,000,000		
b. R.E. Tax @ _____% for _____Months on A.V. _____		$17,600,000		
c. Supervising Governmental Agency Fee		$ 3,510,000		
d. Financial Expense/Housing Finance Agency Fee		$ 1,170,000		
e. Title and Recording Expenses		$ 595,000		
f. H.C. Administrative Expenses		300,000		
g. Surplus from Preoccupancy		(38,950,000)		
Reconstruction Interest	$ ...	$ ...	$ 55,175,000	$ 757...
7. COMMUNITY FACILITIES EQUIPMENT				
a. Equipment and Furnishings	$ --	$ --	$ ...	
8. ESTIMATED DEVELOPMENT COST			$118,203,982	$ 5,737...
9. CONTINGENCY - _____% of Item 8.			$ 2,000,000	
10. WORKING CAPITAL - _____% of Item 8.			$ 2,495,718	
11. ESTIMATED PROJECT COST			$122,699,700	$ 5,799...
12. MAXIMUM MORTGAGE LOAN - 92.26% of Item 11.			390,000,000	5,350
13. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$32,699,700	$ 449...
a. 1. No. of Class A Shares _____ x (Par Value) $ _____			$ ...	
2. No. of Class B Shares 1,307,988 x (Par Value) $25.00			32,699,700	
b. Income Debentures (Interest at _____%)		$ _____	$ ...	
c. Capital Contribution			$ ...	

No. of H.U. 15,372 No. of Rental Rooms 72,896

Cost per H.U. $ 27,206 (Item 8, Col. 3÷No. of H.U.) Cost per Rental Room $ 5,737 (Item 8, Col. 4)

353a

BEST COPY AVAILABLE

SCHEDULE A

Date: 5-1-71 (HOUSING & EDUCATIONAL PARK)

Name of Project RIVERBAY CORPORATION ( ) Cooperative ( ) Rental ( ) Non Profit

Address of Project BRONX, N. Y.

BCLP # _____

BCNP # _____

ESTIMATED DEVELOPMENT COSTS AND CAPITAL REQUIREMENTS

	(1)	(2)	(3)	(4) Cost per Rental Room
1. COST OF LAND ACQUISITION				
a. City of New York		$ 170,250		
b. 12,967,785 @ $1.20 sq. ft.		$15,561,342		
c. Carrying Charges & Expenses		$ 487,390	$16,018,982	$ ...
d. National Development Corp.		(200,000)		
2. CONSTRUCTION COSTS				
a. Site Fill	$ 7,900,000			
b. Piles	$ 8,930,000			
c. Residential Structures	$238,269,000			
d. Comm'l.& Community Space	$18,950,000			
e. Garage Structures	$15,000,000			
f. Power Plant & Dist.System	$27,200,000			
g. Site Work	$13,571,250			
h. City Site Work	$ 3,629,750			
i. Insurance & Prem. on Bonds	$ 3,600,000	$402,808,000		
j. Test Borings	400,000			
k. School Buildings	65,358,000	$ 3,703,580	$406,511,580	$ ...
l. Contractors Overhead				
3. DEVELOPMENT FEE _____ % of Items 2a.-i.			$ 99,000	$ ...
4. PROFESSIONAL SERVICES				
a. Architect's Fee		$ 2,975,000		
b. Engineer's Inspection Fees		$ 1,125,000		
c. Laboratory Fees		$ 200,000		
d. Soil Investigation		$ 100,000		
e. Preliminary Surveys		$ 1,450,000		
f. Legal Fees		$ 270,000	$ 6,120,000	$ ...
5. SELLING OR RENTING EXPENSES				
a. Selling or Renting Fees		$ 600,000		
b. Advertising & Promotion		$ ...		
c. Other		$ _____	$ 600,000	$ ...
6. CARRYING & FINANCING CHARGES				
a. Interest @ _____% for _____Months (Net)		$77,700,000		
b. R.E. Tax @ _____% for _____Months on A.V. _____		$18,200,000		
c. Supervising Governmental Agency Fee		$ 4,038,797		
d. Financial Expense/Housing Finance Agency Fee		$ 1,308,000		
e. Title and Recording Expenses		$ 665,000		
f. H.C. Administrative Expenses		300,000		
g. Surplus from Preoccupancy		(38,950,000)		
h. N.Y.S. & N.Y.C. Corp. Taxes		$ 93,000	$63,354,797	$ ...
7. COMMUNITY FACILITIES EQUIPMENT				
a. Equipment and Furnishings	$ --	$ --	$ ...	
8. ESTIMATED DEVELOPMENT COST			$492,704,359	$ ...
9. CONTINGENCY - _____% of Item 8.			$ 3,499,623	
10. WORKING CAPITAL - _____% of Item 8.			$ 2,495,718	
11. ESTIMATED PROJECT COST			$498,699,700	$ ...
12. MAXIMUM MORTGAGE LOAN - _____% of Item 11. (See Note Below)			$466,000,000	
13. EQUITY REQUIREMENTS OR CAPITAL CONTRIBUTION			$32,699,700	$ ...
a. 1. No. of Class A Shares _____ x (Par Value) $ _____			$ ...	
2. No. of Class B Shares 1,307,988 x (Par Value) $25.00			32,699,700	
b. Income Debentures (Interest at _____%)		$ _____	$ ...	
c. Capital Contribution			$ ...	

No. of H.U. _____ No. of Rental Rooms _____

Cost per H.U. $ _____ (Item 8, Col. 3÷No. of H.U.) Cost per Rental Room $ _____ (Item 8, Col. 4)

Note:
N.Y.S. Housing Finance Agency $ $436,000,000.
N.Y.C. Board of [illegible]

353a

RIVERBAY CORPORATION

SCHEDULE C

INCREASE IN CONSTRUCTION COSTS

a. Site Fill — Increase $450,000.

The fill was installed in accordance with approved filling plans to the elevations shown. Site drawings which were issued after September 1969 revised these grades and required that additional fill be brought in.

b. Piles — Decrease $125,000.

This item represents the piles for the residential buildings and the garages. The work has now been completed. Based upon the actual lengths of piles driven, it is possible to reduce the estimated cost.

c. Residential Structures — Increase $9,203,750

The increase is due to a number of factors:

(1)	Plan changes	$ 3,733,750
(2)	Sub-contract escalation	4,500,000
(3)	Theft and vandalism not covered by insurance	2,000,000
(4)	Direct labor and general condition increases due to extension of construction and delays in work performed by the City	2,700,000
		$12,933,750
Less:	insurance transferred to Item (i)	- 2,600,000
Less:	plumbing distribution transferred to Item (f)	- 1,130,000
	Net Increase	$ 9,203,750

d. Commercial & Community Space — Increase $4,300,000

At the time of the last contract signing in September 1969, final drawings for Shopping Centers Nos. 2 and 3 had not been prepared and the estimates were based upon preliminary sketches. The present estimates are based upon final drawings. The increase applies to Shopping Centers Nos. 2 and 3. The cost of Shopping Center No. 1, for which final drawings were available, remains unchanged. The revised estimate also includes changes made for commercial tenants and the driving of additional piles made necessary by the City's surcharging of adjacent roads.

e. Garage Structures — Increase $1,350,000

Of this amount, $1,000,000 represents the cost of reconstruction of Garage G-3 which was damaged by fire. This money is required for payment to subcontractors. When payment is received from the insurance company, it will accrue to the Housing Company. The balance of the increase represents plan changes such as the addition of spandrel facings, paint striping and elevator vestibules as well as revisions in the exterior masonry treatment, enclosing of first floors, revisions in attendants' offices and modifications in electrical work.

f. Power Plant and Distribution System — Increase $2,850,000

This increase consists of $995,000 additional for the power plant and $1,855,000 for the distribution system. The power plant cost increase covers plan changes ordered by various City agencies, revisions in construction requested by the operating personnel and the inclusion in the estimate of two major items of work which have been proposed but have not as yet been started: conversion of the boilers to accept either fuel oil or natural gas as an operating fuel and the construction of maintenance and storage shops under the cooling tower.

The distribution system increase of $1,855,000 includes $1,130,000 for the plumbing distribution system which was previously listed as part of the residential buildings. This item has been made part of the distribution system since it actually applies to all buildings. The balance of the increase was due to foundation changes, and plan changes such as the addition of new work to serve Shopping Centers Nos. 2 and 3, the addition of manholes and changes in the type of piles from wood to steel.

g. Site Work — Increase $8,071,250

There were no final site plans available at the time of the September 1969 contract signing and cost estimates were based upon preliminary plans. The new estimates are based upon final approved plans. Included in this estimate is $350,000 for a program of site signs which is contemplated but which has not yet been incorporated in the plans.

h. City Site Work — Increase $800,000

The increase represents bulkhead work at a cost of $600,000 which is a City contractual requirement. The balance represents piles driven for City sewers where they crossed Co-op City utility lines and miscellaneous work due to interferences between City work and Co-op City work.

i. Insurance & Premium on Bonds — Increase $2,650,000

Of this sum, $2,600,000 represents the cost of insurance for the job. It was previously listed as part of the residential buildings but has now been listed separately since it covers all the work at Co-op City. The increase of $50,000 in bonds is due to the fact that premiums on payment and performance bonds increase as the cost of work increases.

k. Contractor's Overhead — Increase $300,000

The increase represents 1% of the increase in the construction contract.

RIVERBAY CORPORATION

SCHEDULE "C"

4. Professional Services

f) Legal Fees:

Increased from $200,000 to $210,000 to cover additional work required for mortgage increase.

6. Carrying & Financing Expenses

e) Title & Recording Expenses

1.	Total to date	$453,000
2.	Title Insurance	
	Increased Mortgage $60,000,000 @ $1.443 per M	86,580
3.	Interim Progress	
	Surveys 24 months @ $200	4,800
		$544,380
	Rounded to	$545.000

EXHIBIT "29" - SCHEDULES A, B & C, DATED MAY 1, 1971 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION

SCHEDULE "C"

6b) Carrying & Financing Expenses - R. E. Taxes

REAL ESTATE TAXES -

Paid to	12-31-70 (Net)			$11,611,622.38
Paid 1/25/71	#4995	Period	1/1/71 - 3/31/71	1,009,597.67
Paid 4/25/71	#5318	"	4/1/71 - 6/30/71	795,567.47
		To	6/30/71	$13,416,787.52
Estimated - 1/2 of $2,785,000 Per Schedule B of 9/15/69			7/1/71 - 12/31/71	1,392,500.00
			1/1/72 - 12/31/72	2,785,000.00
REAL ESTATE TAXES - Inception to 12/31/72				$17,594,286.00

BEST COPY AVAILABLE

EXHIBIT "29" - SCHEDULES A, B & C, DATED MAY 1, 1971 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION
SCHEDULE "C"

6a) Carrying & Financing Charges - Net Interest Cost

PERMANENT MORTGAGE	RATE	PRINCIPAL AMOUNT	INCEPTION TO 12/31/70	1971	1972	TOTAL
Series A - 1968	5.20	$ 91,690,000	$12,714,347	$ 4,767,880	$ 4,767,880	$22,250,107
Series A - 1969	6.75	63,040,000	4,964,400	4,255,200	4,255,200	13,474,800
Series A - 1970	6.60	74,270,000	3,676,365	4,901,820	4,901,820	13,480,005
Series A - 1971	6.5646	42,480,000	- -	2,788,645	2,788,645	5,577,290
Sub-Totals		$271,480,000	$21,355,112	$16,713,545	$16,713,545	$54,782,202
ESTIMATED ADD'L MORTGAGE						
As of 1/1/71-Temporary(*)	4.75	$60,000,000	- -	1,425,000	- -	1,425,000
As of 7/1/71	6.50	100,000,000	- -	3,250,000	6,500,000	9,750,000
As of 1/1/72 (**)	6.50	18,520,000	- -	- -	1,203,800	1,203,800
Total Mortgage (Est.)		$390,000,000	$21,355,112	$21,388,545	$24,417,345	$67,161,002
INTEREST EXPENSE ON B.A.N.'s-12/31/70			$19,368,197	- -	- -	19,368,197
						$86,52
TOTAL ESTIMATED INTEREST EXPENSE						
INTEREST INCOME						
Earned on B.A.N. & P.M.L.- 12/31/70						
See Above (*)	5.00	$60,000,000		$12,797,779		$12,797,779
	5.00	40,000,000		- -	- -	750,000
				- -	- -	500,000
See Above (**)	5.00	18,520,000		- -	463,000	463,000
INTEREST EARNED ON CASH & INVESTMENTS TO 12/31/70				$12,797,779	$ 463,000	$13,260,779
TOTAL ESTIMATED INTEREST INCOME						$13,52
NET INTEREST COST						$71,002

1/1/71-6/30/71
1/4 year
1/4 year
1/1/72-6/30/72

358a

EXHIBIT "29" - SCHEDULES A, B & C, DATED MAY 1, 1971 -
ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION (CO-OP CITY) HCLP 604-571
SCHEDULE C
Calculation of Pre-Occupancy Date Net Income
as of 5/1/71
(000 Omitted)

RENT INCOME (Including Utilities)

Section #	Initial Occupancy Date	Annual Rent	12/10/68 to 12/31/70	1971	1972	Total
I	1/69 (12/10/68)	$ 5,814	A	$ 5,814	$ 5,814	
II	9/69	4,662	C	4,593	4,662	
III	1/70	3,697	T	3,671	3,697	
IV	12/70	5,147	U	4,208	5,147	
V	7/71	8,295	A	2,497	8,295	
			L			
TOTAL RENT INCOME (Including Utilities)		$27,615	$11,162	$20,783	$27,615	$59,560

OCCUPANCY EXPENSE

M & O (Including Utilities)	$ 7,230	$ 9,000	$ 9,500	25,730
				$33,830

OTHER INCOME

Gross	$7,080			
Less: Utilities	2,029			
	$5,051	$ 1,382	$ 2,618	$ 4,730
				8,730
				$42,560
Less: N.Y.S. HOUSING FINANCE AGENCY FEE				2,110
				$40,450
Less: CONTINGENCY				1,500
NET PRE-OCCUPANCY INCOME				$38,950

359a

BEST COPY AVAILABLE

RIVERBAY CORPORATION
SCHEDULE "B"

1. Carrying Charges & Operating Expenses

a) Interest & Amortization on Mortgage

	Principal Amount	Annual Interest & Amortization
1968 Series A	$ 91,690,000	$ 5,490,000
1969 Series A	63,040,000	4,593,000
1970 Series A	74,270,000	5,316,000
1971 Series A	42,480,000	2,999,000
	$271,480,000	$18,398,000
* Additional Bonds to be Sold	118,520,000	8,378,000
	$390,000,000	$26,776,000

* at Debt Service Factor of 7.069%

Average Debt Service for Entire Mortgage 6.865%

b) Governmental Agency Charge:

Housing Finance Agency (.18% of $390,000,000)	$702,000
N.Y.S. Div. of Housing & Community Renewal (72,896 RR @ $4.20)	306,163
	$1,008,163
Rounded to	$1,008,000

c) Non Housing Income - Other Income

Debt Service - Interest	$24,376,000 x 1/4 =	$6,094,000
- Principal	2,400,000 x 1/2 =	1,200,000
R. E. Tax	$4,400,000 x 1/4 =	1,100,000
Reserves (2 yr. accumulation $1,200,000)	=	1,200,000
		$9,594,000
		x 5%
		$ 479,700
Rounded to		$ 500,000

RIVERBAY CORPORATION

SCHEDULE "B"

COMPUTATION OF SHELTER RENT TAX

Total Item 1			$42,268,500
Less: Real Estate Taxes			4,380,000
			$37,888,500
Add:			
Parking Income		$2,498,000	
Vacancy & Contingency Reserve		254,572	2,750,572
			$40,639,072
Deduct:			
Utilities			
Electric & Gas		$2,029,000	
Heating & Air Conditioning		1,641,000	
		$3,670,000	
Commercial Space			
Rent	$1,106,000		
Less R. E. Tax	480,000	626,000	
Office Space		157,000	
Washing Machine Income		500,000	
Investment & Other Income		580,000	$ 5,533,000
			$35,106,072
Shelter Rent Tax Computation		35,106,072 / 9	= $ 3,900,675

Rounded to $3,900,000

EXHIBIT "30" - LETTER DATED JUNE 30, 1971, FROM CHARLES J. URSTADT, TO HON. JOSEPH H. MURPHY, WITH CERTIFIED COPY OF RESOLUTIONS OF RIVERBAY'S BOARD OF DIRECTORS - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

June 30, 1971

The Honorable Joseph H. Murphy
Chairman
New York State Housing Finance Agency
1250 Broadway
New York, New York 10001

Re: Riverbay Corporation (Co-op City)
HCNP #64-571 (81)
Application for Increased Mortgage

Dear Sir:

On June 21, 1971, Riverbay Corporation filed an application to increase the mortgage by $60,000,000 from $376,000,000 to $436,000,000. This application has been received and approved by the appropriate bureaus in the Division.

The increase in the mortgage is requested in order to cover increases in construction costs, carrying and financial costs and operating costs.

Riverbay Corporation filed on June 24, 1971, an application for an increase in carrying charges pursuant to a resolution of the Board of Directors, copy of which is herewith attached. This increase is reflected in the financial Schedule B attached hereto and will produce sufficient added revenue to pay all required charges.

The increase in carrying charges is effective in two stages: 20% on January 1, 1973 and 12 1/2% on July 1, 1974.

I recommend that funds aggregating $60,000,000 thereby increasing this mortgage from $376,000,000 to $436,000,000 be reserved for this project.

Sincerely,

s Charles J. Urstadt
Charles J. Urstadt

CJU:gtw
Attachments

cc: CHRONO
P-4, C.J.Urstadt, P.Belica, P.F. Gaynor,Jr.
W.A.Conway, Jr., M.M.Duke, A. Hyman,
B. Hirschberg, P. Runco

EXHIBIT "30" - LETTER DATED JUNE 30, 1971, FROM CHARLES J. URSTADT, TO HON. JOSEPH H. MURPHY, WITH CERTIFIED COPY OF RESOLUTIONS OF RIVERBAY'S BOARD OF DIRECTORS - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RIVERBAY CORPORATION

CERTIFICATE

I, ROY GAINSBURG, being the duly elected, qualified and acting Assistant Secretary of RIVERBAY CORPORATION, a New York corporation (hereinafter called the "Company"), do hereby certify that annexed hereto are true and correct copies of excerpts of minutes of the meeting of the Board of Directors of the Company duly held on June 23, 1971; that said excerpts reflect all of the action taken by the Board of Directors of the Company with respect to the increase of carrying charges at the Co-op City project; that such meeting was duly called and held on the date indicated; that a quorum was present and acting throughout such meeting; and that the resolutions adopted at such meeting as set forth in the annexed excerpts have not been modified or amended in any respect whatsoever and are in full force and effect as of the date of this certificate.

IN WITNESS WHEREOF I have hereunto annexed my hand and the seal of the Company on the 24th day of June, 1971.

ROY GAINSBURG, Assistant Secretary

[Corporate Seal]

EXHIBIT "30" - LETTER DATED JUNE 30, 1971, FROM CHARLES J. URSTADT, TO HON. JOSEPH H. MURPHY, WITH CERTIFIED COPY OF RESOLUTIONS OF RIVERBAY'S BOARD OF DIRECTORS - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

RESOLVED that, subject to the approval of the Commissioner of Housing and Community Renewal of the State of New York, the carrying charges (including utilities) at the Co-op City project are hereby increased by 20%, effective January 1, 1973, and that such carrying charges, as so increased, are hereby further increased, effective July 1, 1974, by 12-1/2% of the then carrying charges; and it was further

RESOLVED, that the officers of this corporation or any of them are hereby authorized and directed to enter into, on behalf of this corporation, such instruments and documents and to do and perform all such other acts and things as may be necessary or advisable in order to effectuate the aforesaid increases in the carrying charges.

EXHIBIT "31" - LETTER DATED MARCH 8, 1972, FROM ASSISTANT COMMISSIONER HECHT, TO MR. HAROLD OSTROFF - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

EXECUTIVE DEPARTMENT · DIVISION OF HOUSING AND COMMUNITY RENEWAL

393 SEVENTH AVENUE
NEW YORK, N. Y. 10001

PETER F. GAYNOR, JR.
DEPUTY COMMISSIONER

AVRUM HYMAN
DEPUTY COMMISSIONER

WILLIAM A. CONWAY, JR.
COUNSEL

ALBERT E. BIBBY
ASSISTANT COMMISSIONER

WILTON N. DUKE
ASSISTANT COMMISSIONER

FRED HECHT
ASSISTANT COMMISSIONER

STATE OF NEW YORK
CHARLES J. URSTADT
COMMISSIONER

ROBERT E. HERMAN
ASSISTANT COMMISSIONER

GEORGE ROUMANIS
ASSISTANT COMMISSIONER

ST. CLAIR T. BOURNE
EXECUTIVE ASSISTANT & INTERGROUP RELATIONS COORDINATOR

PETER J. HOPKINS
SPECIAL ASSISTANT TO THE COMMISSIONER

DAVID N. BUSSMAN
ADMINISTRATIVE OFFICER

March 8, 1972

Mr. Harold Ostroff, President
Riverbay Corporation
465 Grand Street
New York, New York 10002

Dear Mr. Ostroff:

As you are aware, Commissioner Urstadt has asked that the tenant-cooperators at Co-op City be given an opportunity, directly or through counsel of their choice, to develop and present at a public meeting alternate recommendations, based upon facts and sound findings, and with the burden of proof on the tenants, which would show that a lesser amount than the projected 20 percent increase in carrying charges scheduled for next January 1, 1973 and 12.5 percent scheduled for July 1, 1974 would suffice or that all of the funds requested are not required.

In order to accommodate the greatest number of tenant-cooperators at the least inconvenience in travel to them, we have determined that the full Community Room at Co-op City would be the best place to hold the meeting. Accordingly, we would like to reserve these rooms for the afternoon and evening of April 18th and the morning and afternoon of April 19th, the proposed dates of the meeting. The actual hours will be 1 P.M. to 6 P.M. and 7:30 P.M. to 10 P.M. on April 18th and 10 A.M. to 5 P.M. on April 19th.

In making the selection of the Community Room at the project, we recognize that its size will limit the number of tenant-cooperators who will be able to attend. We will, however, welcome all who are able to be accommodated and will ask those wishing to speak to register their desire at the time of entry so that we may allocate our time properly.

EXHIBIT "31" - LETTER DATED MARCH 8, 1972, FROM ASSISTANT COMMISSIONER HECHT, TO MR. HAROLD OSTROFF - ANNEXED TO AFFIDAVIT OF JAY F. GORDON

The Division will have appropriate staff representatives present to conduct the meeting and to furnish any further information that may be requested. It would be advisable, as well, to have knowledgeable representatives of the Riverbay Housing Corporation present as well should additional information be required.

I look forward to a favorable response from you as to the availability of the Community Room at Co-op City on the dates indicated.

Sincerely,

Fred Hecht

Fred Hecht
Assistant Commissioner
Field Services

CC: Mr. Edward Aronov, Manager

AFFIDAVIT OF MILTON FORMAN SWORN TO JANUARY 30, 1973 - IN OPPOSITION TO DEFENDANTS' MOTIONS AND IN SUPPORT OF CROSS-MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MILTON FORMAN, being duly sworn, deposes and says:

1. I am the first-named plaintiff herein, and I make this affidavit in opposition to the defendants' (except Riverbay's) motion to dismiss the complaint and in support of the plaintiffs' several motions herein.

Class-Action Status

2. I previously verified the Amended Complaint herein on behalf of the plaintiffs. Paragraph 2 thereof sets forth the reasons why this Court is requested to grant class action status to Counts 1 through 9 of said Amended Complaint and said paragraph is hereby incorporated herein by reference. As of the date of this affidavit, more than 13,000 of the approximately 15,000 families residing in Co-op City have contributed to the Advisory Council's fund to finance this litigation,

thereby evidencing the total involvement of the class in this action.

3. In addition, for the reasons set forth in paragraphs 9 - 13 below, very few, if any, of these families could afford to carry on this lawsuit on an individual basis.

The Fraud Perpetrated on the Plaintiffs

4. I, and my wife, Ellen, like the other plaintiffs, subscribed for our stock in Riverbay on the basis of the statements contained in either the Information Bulletin or the Revised Information Bulletin. We simply had no other information available from which we could determine if we could afford to live in Co-op City. As is set forth in the accompanying memorandum of law, only those people who earned up to six times the monthly carrying charge (seven times in the case of a family of four or more) could qualify to be a stockholder of Riverbay, so that for practically all of the residents, the entire motivation to purchase stock in Riverbay was to obtain housing in a co-operative community at a cost which we could afford.

AFFIDAVIT OF MILTON FORMAN
SWORN TO JANUARY 30, 1973 -
IN OPPOSITION TO DEFENDANTS'
MOTIONS AND IN SUPPORT OF
CROSS-MOTION

5. I completely believed the assurances in the information bulletin sent to me, especially in view of the statements concerning the firm lump sum building contract and the close supervision of the State of New York. To be sure, I expected increases in monthly carrying charges due to normal increases in the cost of operations, but I never expected monumental increases in the cost of construction. Neither I nor the hundreds of residents with whom I have spoken since we, through the Advisory Council, collectively retained counsel had any inkling of any of the facts disclosed in the Amended Complaint, the Gordon affidavit submitted herewith, and plaintiffs' memorandum of law. Many of those facts were told to us by counsel for the first time in late March, 1972 at a meeting in their office. The bulk of the plaintiffs named herein and represented herein were advised of these facts by the local newspapers serving Co-op City following a public meeting on April 6, 1972.

6. Mr. Ostroff, in his affidavit (¶ 21) states that "each and every co-operator was advised of [forthcoming increases in carrying charges] in writing,"

referring to a "Dear Subscriber" letter attached to his affidavit as Exhibit D. The deficiencies of that letter and its legal effect are discussed in the accompanying memorandum of law submitted herewith. When, after reading Mr. Ostroff's affidavit, I told our counsel that I had no recollection of ever having seen that letter, he asked me to attempt to ascertain if and under what circumstances any of the other residents of Co-op City had received such a letter. I and several other persons then asked hundreds of residents if they had any recollection of recieving said "Dear Subscriber" letter. We were able to turn up only a handful of residents who had any recollection of ever having seen such a paper. Considering that the letter included a receipt acknowledging that the recipient had received and read that letter, it should be a simple metter for Mr. Ostroff to tell the Court how many residents signed receipts and when and under what circumstances said letter was sent.

7. In contrast therewith, Mr. Ostroff did cause Riverbay to reprint his affidavit of

AFFIDAVIT OF MILTON FORMAN
SWORN TO JANUARY 30, 1973 -
IN OPPOSITION TO DEFENDANTS'
MOTIONS AND IN SUPPORT OF
CROSS-MOTION

July 6, 1970 submitted in the Hanks case and circulate it to the residents. A copy of that affidavit is annexed hereto as Exhibit A. Its significance is discussed in Point V of the memorandum of law submitted herewith.

8. Mr. Ostroff in his affidavit herein, ¶ 48, makes the astounding statement that

> "the interests owned by plaintiffs are [not] worth any less than what they paid for them. In fact, plaintiffs nowhere contend that the values of their securities' are any less than such values on the day of subscription."

When we subscribed for Riverbay stock, we were told in the Information Bulletin that for an investment of $32,795,550, we were getting a corporation which would have a mortgage liability of $250,900,000. (Ex. 2 to Gordon aff'd., p. 13). Now, for an investment of $32,803,200 (Ex. 3 to Gordon aff'd, p. 5), we have a corporation burdened with a mortgage liability of $375,755,710 (Ex. 14 to Gordon aff'd.*). I wonder if Mr. Ostroff would

*The figure of $375,755,710 is the result arrived at by reducing the $421,755,710 shown therein by $46,000.00, the amount allocable to the construction of the Education Park, which is not the subject of challenge in the Amended Complaint.

pay the same consideration for his purchases when he found out he was only getting a fraction of the equity he bargained for?

The Temporary Injunction

9. Before the Court is a request by the plaintiffs for a temporary injunction of the monthly carrying charge increase from $29.39 per room to $35.27 per room, an increase of $5.88 or 20% which became effective on January 1, 1973 while this action was pending.

10. As hereinbelow indicated, by law, Co-op City is a community made up of people who did not earn more than six times their monthly carrying charge (seven times in cases of families of four or more). At the outset, based upon the Information Bulletin's statement of $23.02 per room carrying charge, the maximum allowable annual income for a family of four or more (assuming a five room apartment) was approximately $9,660. Co-op City has many senior citizens living on Social Security benefits or union pensions. Their maximum income qualification (assuming a four room apartment) was $6,624.

11. Obviously, there have been previous increases in carrying charges to get from $23.02 to $29.37 per room, the rate in effect on December 31, 1972. The latter figure already represents an increase of approximately 33 1/3% over the stated cost. The present increase of $5.88 brings this percentage up to approximately 60%. Obviously, the residents have not correspondingly received increases in income equaling 60%. Indeed, in cases of those same senior citizens, increases in Social Security benefits during this period have been about half that sum. Some of the residents' incomes may actually have dropped.

12. Through living in Co-op City, I have seen that the residents' situation is quite serious. Many are considering giving up their apartments and moving elsewhere. In other cases, wives and mothers have had to leave their children during the day and take jobs. Some undoubtedly have or will have to seek public assistance in order to meet this additional cost. In virtually all cases, the pinch cuased by this latest increase is severe. If the plaintiffs are correct in their claims against the

BEST COPY AVAILABLE

defendants, then the Court will ultimately award financial relief either to the plaintiffs or Riverbay or both. For many of the residents of Co-op City, this relief will come too late if they are forced to make these major changes in their lives in order to cope with this latest increase. It is little comfort to a family who must give up their home and relocate, or go on public assistance, that sometime in the future, Riverbay's mortgage will be reduced. Our attorneys' efforts at obtaining a voluntary moratorium from the defendant mortgagee (the Agency) pending a complete review of this matter was rejected.

13. If the plaintiffs are, on the basis of the other papers submitted herewith, ultimately to succeed, what justification can there be for continuing an increased monthly carrying charge which is a hardship to many of the plaintiffs? Surely a Court of equity should shift the burden of these costs to the defendants in the case of the demonstration of probability of such success made in the papers herein.

[Duly sworn to
January 30, 1973]

s/ Milton Forman
MILTON FORMAN

The following is the affidavit of reply by Harold Ostroff Riverbay Corporation president, in connection with the injunction action taken by Leonard Hanks, president of the Tenants Council. This affidavit is presented in full to answer questions of why a rent increase has been instituted, the methods by which it goes into effect, and for an understanding of how a cooperative functions.

The Suit is being defended by the Counsel for Co-op City, the cost of which must be shared by all cooperators.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

ANSWERING
AFFIDAVIT

LEONARD HANKS and LORRAINE HANKS, individually and as President and Treasurer respectively of the Co-op City Tenants' Council, an unincorporated association, on behalf of themselves and all others similarly situated,

Petitioners

-against-

CHARLES URSTADT, Commissioner of the Division of Housing and Community Renewal of the State of New York, and RIVERBAY CORPORATION,

Respondents.

STATE OF NEW YORK
COUNTY OF NEW YORK
ss:

HAROLD OSTROFF being duly sworn, deposes and says:

* * * * *

37. These same budgets with different and almost invariably lesser amounts on almost every line, were prepared in 1964. As to the construction budget, we were required to estimate the cost of construction which would not be completed for five or more years. We were required to estimate many other factors which would occur over these years, many unforseen and unforseeable. In essence, we were required to estimate the state of the national economy, inflation, wage rates, interest rates, the progress of the Vietnam war, etc., as it would fluctuate over the next five or more years.

* * * * *

48. Subsequently, in the latter part of 1969, it became possible to arrive at the present estimated costs of maintaining and operating the development. At that time it had become necessary to increase the amount of the mortgage so as to

obtain enough funds to complete the construction. At that time, also, the City of New York had granted additional tax abatement to the development, without which the estimated cost would have increased far beyond the 16.1%.

* * * * *

50. As stated, these new carrying charges were determined in connection with the increase in mortgage which was required in order to provide the Housing Company with the funds necessary to complete the project. Without such addition to the mortgage the entire enterprise would have collapsed.

* * * * *

55. I can only say that these increases result from the nationwide problems of inflation.

* * * * *

68. The statement that the Commissioner failed to exercise his statutory duty of supervision can be made only by someone who is completely ignorant of the facts.

* * * * *

Sworn to before me this
6th day of July, 1970
MILTON ALTMAN
Notary Public

s/ Harold Ostroff
HAROLD OSTROFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs contend that there is no genuine issue to be tried with respect to the following material facts:

1. Defendant United Housing Foundation ("United") is a corporation organized and existing under the Not-for-Profit Corporation Law of the State of New York, which at all times mentioned in the amended complaint was engaged, inter alia, in the sponsorship of middle-income cooperative housing.

2. At all times mentioned in the amended complaint, defendant Community Services, Inc. ("Community") was and still is a corporation organized and existing under the Business Corporation Law of the State of New York.

3. At all times mentioned in the amended complaint, Community was and still is a wholly owned subsidiary of United.

4. Defendant Riverbay Corporation ("Riverbay") is a mutual company organized and existing under the Private Housing Finance Law of the State of New York

(popularly called the Mitchell-Lama Act) for the purpose of owning and operating a middle-income cooperative housing development known as "Co-op City", comprising approximately 15,372 apartment units located in the County of Bronx, State of New York.

5. Defendant New York State Housing Finance Agency ("Agency") is a corporate agency of the State of New York ("State"), created by the Mitchell-Lama Act, to help finance middle-income housing built pursuant to said Act by means of the making of mortgage loans, funded by the sale of bonds.

6. In May and June of 1965 Abraham E. Kazan was the president and a director of United, Community and Riverbay.

7. At all times mentioned in the amended complaint, defendants Harold Ostroff, Robert Szold and George Schecter were directors or officers, or both, of United and Community and Riverbay.

8. At all times mentioned in the amended complaint, defendants Paul Kramer and Irving Alter

were directors or officers, or both, of Community and of Riverbay.

9. At all times mentioned in the amended complaint, defendant Anthony Marino was a director or officer, or both, of United and of Community.

10. At all times mentioned in the amended complaint defendants Harold Ostroff, Robert Szold, Milton Altman, George Schecter, Anthony Marino, Paul Kramer, Irving Alter, dominated and controlled Riverbay, and selected its officers, directors, or both.

11. Prior to May, 1965, United caused Riverbay to be organized and applied to the Agency and to the State, acting by and through the Commissioner of Housing and Community Renewal, for approval of a proposed cooperative housing development in Bronx County, New York to be known as Co-op City, to be sponsored by United, owned by Riverbay, and constructed by Community, as general contractor.

12. Riverbay and Community entered into a construction contract, a sales agency agreement and an administrative service agreement, each dated June 18, 1965 and approved by the State, acting by and through its Commissioner of Housing and Community

Renewal (the "Commissioner"). Exhibits 4, 15, and 18 annexed to the affidavit of Jay F. Gordon (the "Gordon affidavit") are true copies of the construction contract, the sales agency agreement and the administrative service agreement, respectively.

13. Riverbay entered into a building loan agreement with the Agency, dated July 15, 1965 and approved by the Commissioner. A true copy thereof is annexed to the Gordon affidavit as Exhibit 10.

14. Commencing on or about May 12, 1965, United and Community, with the approval and consent of the State, acting by and through the Commissioner, published and circulated and caused Riverbay to publish and circulate an "Information Bulletin", dated May 12, 1965, a true copy of which is annexed to the Gordon Affidavit as Exhibit 2.

15. Commencing on or about May 15, 1967, United and Community, with the approval and consent of the State, acting by and through the Commissioner, published and circulated and caused Riverbay to publish and circulate a revised "Information Bulletin", dated May 15, 1967, a true copy of which is annexed to the Gordon affidavit as Exhibit 3.

16. On April 14, 1967, January 22, 1968, March 29, 1968, October 9, 1969 and July 7, 1971, respectively, the construction contract between Community and Riverbay was modified, with the approval of the Commissioner, by written agreements, true copies of which are annexed to the carbon affidavit as Exhibits 5, 6, 7, 8 and 9, respectively.

17. The Information Bulletin, the revised Information Bulletin and subscriptions for the stock of Riverbay were circulated and received by use of the mails.

18. On April 14, 1967, February 3, 1969, October 9, 1969 and July 7, 1971, respectively, the building loan agreement between Riverbay and the Agency was modified, with the consent of the Commissioner, by written agreements, true copies of which are annexed to the Gordon Affidavit as Exhibits 11, 12, 13 and 14, respectively.

19. On April 14, 1967 and October 9, 1969, respectively, the sales agency agreement between Riverbay and Community was modified, with the consent of the Commissioner, by written agreements, true copies of which are annexed to the Gordon affidavit as Exhibits 16 and 17, respectively.

20. On April 14, 1967 and October 9, 1969, respectively, the administrative service agreement between Riverbay and Community was modified, with the consent of the Commissioner, by written agreements, true copies of which are annexed to the Gordon affidavit as exhibits 18 and 19, respectively.

21. Exhibit 21 annexed to the Gordon affidavit is a true copy of (a) a letter dated June 16, 1965, which was delivered by Community to Mr. Paul Belica, executive director of the Agency; (b) a handwritten endorsement made upon the face of said letter after receipt thereof, by Mr. Belica or by another duly authorized officer, employee or representative of the Agency or of the Commissioner, or both; and (c) the balance sheet of Community, as of December 31, 1964 (unaudited), previously submitted by Community to the Agency and referred to in said letter of June 16, 1965.

22. Exhibits 22 and 23, respectively, annexed to the Gordon affidavit, are true copies of letters, both dated June 18, 1965 and submitted

to the New York State Division of Housing and Community Renewal by Community and Riverbay, respectively.

23. Exhibit 24 annexed to the Gordon affidavit is a true copy of a document prepared by Riverbay and approved on its behalf by Abraham E. Kazan and submitted to and approved by the Commissioner, in connection with the construction and financing of the Co-op City project.

24. Exhibits 25, 26, 27, 28 and 29 annexed to the Gordon affidavit are true copies of schedules dated June 18, 1965, March 13, 1967, March 29, 1968, September 15, 1968 and May 1, 1971, respectively, prepared and submitted by or on behaif of Riverbay or Community, or both, to the Commissioner, in connection with the construction and financing of the Co-op City housing project.

25. Exhibit 30 annexed to the Gordon affidavit is a true copy of the Commissioner's file copy of his letter dated June 30, 1971 to the then chairman of the Agency, together with

the certified copy of a resolution of Riverbay's Board of Directors, referred to in said letter.

26. Exhibit 31 annexed to the Gordon affidavit is a true copy of a letter dated March 8, 1972 from Fred Hecht, an assistant commissioner of the Division of Housing and Community Renewal, to the defendant Ostroff, as president of Riverbay.

27. Exhibit 1 annexed to the Gordon affidavit is a true copy of a letter dated February 4, 1972 from the assistant director of the Bureau of Finance of the Division of Housing and Community Renewal, on behalf of the director of said bureau, to Jay Gordon, Esq. of Phillips, Nizer, Benjamin, Krim & Ballon, the undersigned attorneys for the plaintiff in this action.

28. Exhibit "A" annexed to the affidavit of Milton Forman is a true copy of an affidavit of the defendant Harold Ostroff, sworn to July 6, 1970 and filed in an action or proceeding then pending in the Supreme Court of the State of New York.

29. Prior to June 16, 1965, the

Commissioner had promulgated and there was then in effect a "Guide for Development of Limited Profit Housing" which included, amoung other things, the portion thereof, under the heading "CONTRACTOR'S FINANCIAL PREQUALIFICATION REQUIREMENTS" quoted in full paragraph 8 of the Gordon affidavit.

30. At all times mentioned in the amended complaint the Agency knew all of the facts herein alleged.

Dated: New York, N.Y.
February 1, 1973

PHILLIPS,NIZER,BENJAMIN,KRIM & BALLON

BY: s/Jay Gordon
A Member of the Firm

Attorneys for Plaintiffs
477 Madison Avenue
New York, N. Y. 10022
758-6700

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs for their amended and supplementary statement pursuant to Rule 9 (g) of the General Rules of this Court contend that there is no genuine issue to be tried with respect to the following material facts:

AMENDED STATEMENT

10. At all times mentiond in the amended complaint, defendants United, Community, State, Harold Ostroff, Robert Szold, Milton Altman, George Schechter, Anthony Marino, Paul Kramer, Irving Alter, dominated and controlled Riverbay and selected its officers, directors, or both.

20. On April 14, 1967 and October 9, 1969, respectively, the administrative service agreement between Riverbay and Community was modified, with the consent of the Commissioner, by written agreements, true copies of which are annexed to the Gordon affidavit as Exhibits 19 and 20, respectively.

24. Exhibits 25, 26, 27, 28 and 29 annexed to the Gordon affidavit are true copies of schedules dated June 18, 1965, March 13, 1967, March 29, 1968, September 15, 1969 and May 1, 1971, respectively, prepared and submitted by or on behalf of Riverbay or Community, or both, to the Commissioner, in connection with the construction and financing of the Co-op City housing project.

SUPPLEMENTAL STATEMENT

31. Prior to April 14, 1967, at least one of the residents of Co-op City subscribed for Class B capital stock of Riverbay and paid a deposit thereon.

32. The subscribers to the Class B capital stock of Riverbay have paid between $32,000,000 and $33,000,000 to Riverbay therefor.

33. The average monthly carrying charge to the residents of Co-op City increased from $29.39 per room to $35.27 per room on January 1, 1973 and a further increase to $39.68 per room is scheduled to

go into effect on July 1, 1974.

Dated: New York, N. Y.
February 7, 1973

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

By s/ George Berger
A member of the firm

Attorneys for Plaintiffs
477 Madison Avenue
New York, N. Y. 10022
758-6700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:-

HAROLD OSTROFF, being duly sworn, deposes and says:

1. I am making this affidavit in reply to the affidavits and Memorandum of Law of the plaintiffs, served in opposition to the defendants' motion to dismiss the amended complaint. I am doing so to set forth certain additional facts with regard to two points only -- (a) the fact that there is no possibility of profit by anyone on the sale of stock in Riverbay Corporation, and (b) the fact that the stock purchased by the plaintiffs is today worth at least as much as the price paid for it.

2. I cannot understand how anyone can seriously contend that the stock of Riverbay Corporation or any other cooperative organized and existing under the Mitchell-Lama law can be sold

at a profit. In all of my experience with cooperatives of this nature, and with cooperatives organized under the predecessor statutes dating back to 1927, I have never heard of a single case in which the stock of such cooperatives has been sold at a profit.

3. Furthermore, I know that the Bylaws of Riverbay Corporation require every stockholder who desires to sell to first offer his stock to the corporation at the exact price he paid for it. This type of Bylaw exists in similar form in all of the types of cooperatives I have mentioned. Such cooperatives always exercise the option to purchase whenever there is someone on the waiting list maintained by the cooperatives who wishes to buy the stock. At the present time, Riverbay Corporation has approximately 7,000 applicants on its waiting list and would, therefore, be in a position to exercise the option if anyone wished to sell. With a turnover at present of approximately 300 families per annum, this waiting list will last for a long, long time.

4. We in the cooperative movement have found that our low-cost housing cooperatives have been in great demand and have had long waiting lists for many, many years. However, as a precaution, most of the cooperatives I am connected with have extablished and maintained reserve funds to be utilized for the repurchase of stock if drastic changes in economic conditions make it impossible to find buyers.

5. A like reserve fund has been established at Co-op City and as of December 31, 1972 amounted to a total of $917,338. Thus, assuming that our waiting list of 7,000 applicants were to suddenly melt away, this substantial reserve fund would nevertheless be available for the exercise of options and repurchase of stock at par value, which is the exact price paid.

6. I respectfully state that no one familiar with the facts with regard to this type of cooperative housing in the State of New York would seriously contend that any stockholder of

Riverbay Corporation could ever anticipate selling his stock at a profit.

7. As to the question whether the stock which was purchased at a price of $25 per share ($450 per room) is today worth at least that figure, the answer is also clear. Every person who has moved from Co-op City to date, as well as the approximately 15,000 people who have subscribed for stock at some point and late changed their minds before moving in, promptly received the full return of the purchase price of his stock. Any person who desires to move today, tomorrow or at any time in the future, will promptly receive the full purchase price of his stock.

8. Similarly, while the rentals have risen and will rise further, the apartments remain an outstanding value. Current housing built under the Mitchell-Lama Law costs at least twice as much in monthly rentals and would cost at least twice as much in construction costs as well. The total cost of Co-op City was approximately $400,000,000.

It would cost $800,000,000 to build it today.

9. We, today, have thousands of people who are on our waiting list, willing and eager to buy apartments at Co-op City at the stated price of $25 per share, or $450 per room, with full knowledge that the current rent is approximately $35 per room and that it will rise to approximately $40 per room on July 1, 1974. Moreover, approximately 4,500 of the current residents of Co-op City elected to move into the development after the present rent levels were announced to them, even though they could, if they wished, have cancelled their applications and received full refund of their payments.

10. Accordingly, it seems beyond dispute that, regardless of the other issues raised, the stock purchased by the residents at Co-op City is today worth at least as much as they paid for it.

s/ Harold Ostroff

[Duly sworn to
March 20, 1973]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE BERGER, being duly sworn, deposes and says:

1. I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the plaintiffs herein, and I make this affidavit to bring to the attention of the Court, an additional fact of which we were not aware on January 30, 1973, the date of execution of the plaintiffs' affidavits herein. This new fact lays to rest the defendants' contention (however specious) that the plaintiffs are not "stockholders" because they have not as yet received their certificates.

2. On January 27, 1973, the Co-op City Times published on page 1, a statement by the defendant Riverbay Corporation, which corporation, as has been previously demonstrated, is under the control of the other defendants herein. A copy of

that statement is annexed hereto as Exhibit 1 and made a part hereof.

3. As appears therefrom, the defendants advised the plaintiffs and the class they seek to represent, that they may deduct on their personal income tax returns for the year 1972, a "proportionate share of interest and real estate taxes paid by [Riverbay]." This advice was undoubtedly intended to apprise the plaintiffs of the provisions of Section 216 of the Internal Revenue Code, which states, that "in the case of a tenant-stockholder (as defined in sub-Section (b)(2)," such a deduction is permissible. Sub-section (b)(2) defines a "tenant-stockholder" as follows: "An individual who is a stockholder in a co-operative housing corporation . . . ." (Emphasis added). The same definition is employed in Reg. § 1.216-1(e).

4. It is inconceivable that the defendants can argue on this motion that the plaintiffs are not "stockholders" and, at the same time, advise them to take deductions on their income tax returns, which

are necessarily dependent upon their status as such stockholders.

s/ George Berger
GEORGE BERGER

[Duly sworn to
March 28, 1973]

EXHIBIT 1 - STATEMENT BY RIVERBAY CORPORATION DATED JANUARY 27, 1973 - ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF GEORGE BERGER

Co-op City Times

Co-op City's official publication/serving 15,382 member families in the world's largest cooperative community.

VOL. 8, No. 13 — January 27, 1973

1972 Income Tax Deductions

The tax law provides that each tenant-cooperator may deduct his proportionate share of interest and real estate taxes paid by the housing corporation.

These deductions are available only if the taxpayer itemizes his deductions and does not take the optional standard deductions.

The deductions available to each cooperator for 1972 are:
Real Estate Taxes - 7.66% of carrying charges paid for 1972
Interest - 70.59% of carrying charges paid for 1972

To compute your deductions take the following steps:

1. Deduct your reserve fund payment (50 cents per room) from your monthly carrying charge.
2. Multiply the resulting figure by the number of months you resided in Co-op City during the year 1972 to obtain the amount of rent paid.
3. Multiply the amount obtained in (2) above by the percentages shown opposite Real Estate Taxes and Interest. These are the amounts you are permitted to deduct.

Example:

John and Jane Doe live in a 5-room apartment, and pay a monthly carrying charge of $192.50 (including the Reserve Fund charge of 50 cents per room). They lived in Co-op City for the entire year of 1972, so their computation would be:

1. $192.50—monthly carrying charge
   − 2.50—(50 cents per room reserve fund)
   $190.00 Base
2. $190.00 x 12 months = $2280
3. $2280 x 7.66% = $174.65 Real Estate Tax
   $2280 x 70.59% = $1609.45 Interest

BEST COPY AVAILABLE

SECOND SUPPLEMENTAL AFFIDAVIT OF GEORGE BERGER - SWORN TO AUGUST 31, 1973 - IN SUPPORT OF CROSS-MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE BERGER, being duly sworn to, deposes and says:

1. I am a member of the firm of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for the plaintiffs herein, and I make this affidavit to bring to the attention of the Court a new fact which materially bears upon one of defendants' contentions in the pending motion.

2. In support of defendants' argument that Riverbay Corporation would always be in a position to repurchase the stockholders' shares, Harold Ostroff stated:

> "Such cooperatives always exercise the option to purchase whenever there is someone on the waiting list maintained by the cooperatives who wishes to buy the stock. At the present time, Riverbay Corporation has approximately 7,000 applicants on its waiting list and would, therefore, be in a position to exercise the option if anyone wished to sell. With a turnover at present of

> approximately 300 families per annum, this waiting list will last for a long, long time.
>
> * * *
>
> "5. A like reserve fund has been established at Co-op City and as of December 31, 1972 amounted to a total of $917,338. Thus, assuming that our waiting list of 7,000 applicants were to suddenly melt away, this substantial reserve fund would nevertheless be available for the exercise of options and repurchase of stock at par value, which is the exact price paid." (Reply affidavit of Harold Ostroff, sworn to March 20, 1973, ¶¶ 3, 5. Emphasis added.)

3. Attached hereto as Exhibits A and B are advertisements taken out by Riverbay Corporation in this past Weekend's editions of the New York Post and The New York Times, soliciting applications for two and three bedroom apartments. Attached hereto as Exhibit C is a news story appearing in the August 30, 1973 edition of the City News wherein Edward Aronov, identified as the "Executive Manager of Co-op City" is quoted as stating:

> "[T]he advertisements were one-shot insertions designed to 'build up' the waiting lists for two and three bedroom apartments.
>
> "As for one-bedroom apartments, Aronov stated, 'We have thousands of applications for the one-bedroom apartments and at the present rate of move-outs, applicants for one-

> bedroom apartments have to wait for some time before their names are reached.'"

4. It would thus appear that Mr. Ostroff's sworn statement was, at the very least, highly misleading. A waiting list consisting almost exclusively of applicants for one-bedroom apartments can hardly justify the claim that the existing "waiting list" would provide willing buyers for two and three-bedroom apartments "for a long, long time."

s/ George Berger
GEORGE BERGER

[Duly sworn to
August 31, 1973]

s/ Jay F. Gordon
Notary

EXHIBIT A - ADVERTISEMENT, NEW YORK POST, AUGUST 25, 1973 - ANNEXED TO SECOND SUPPLEMENTAL AFFIDAVIT OF GEORGE BERGER

CO-OPS & CONDOMINIUMS

590 Co-ops & Condominiums

1220 5th AV- 4½ rms, 2 pcms, 2l baths, eatin kitchen, 8 closets. Doorman, maintenance including elec. 647-2069. After 7 P.M. 527-1128

CO-OP CITY

REOPENING APPLICATION LIST
2 & 3 BEDROOM APTS ONLY

A SAFE COMMUNITY
FOR FAMILY LIVING

Investment: $450 per room
$38 per rm avg mo carrying chge
Includes central A/C, Gas & elec.

WRITE FOR APPLICATION TO:

CO-OP CITY APPLICATION OFC
4359 BARTOW AVE
CO-OP CITY, N.Y. 10475
GREAT FOR KIDS
Nursery thru High School on Prem.
Recreational facils for whole Fam.
2 SHOPPING CENTERS
GOOD TRANSPORTATION
EXPRESS BUS TO MIDTOWN
NEW IN CITY SUBURB

EXHIBIT B - ADVERTISEMENT, NEW YORK TIMES, AUGUST 26, 1973 - ANNEXED TO SECOND SUPPLEMENTAL AFFIDAVIT OF GEORGE BERGER

CO-OP CITY

Reopening application list
2 & 3 BR apts only
A safe community
for family living

Great for kids
Nursery thru H.S. school on premises
Recreational facils for whole family
3 shopping centers
Good bus transportation
Express bus to midtown
New in city suburb

Investment: $450 per rm
$38 per mo avg mo carrying charges
Incl central air, gas & elec

Write for application to:

Co-op City Applications Office
4359 Bartow Ave, Co-op City, N.Y. 10475

EXHIBIT C - NEWS STORY, CITY NEWS, AUGUST 30, 1973 - ANNEXED TO SECOND SUPPLEMENTAL AFFIDAVIT OF GEORGE BERGER

CITY NEWS — Thursday, August 30, 1973

CC Takes Out Real Estate Ads To Build Up Waiting Lists

For the first time since Co-op City's initial 15,372 families were settled into the development, Riverbay Corp. has utilized real estate advertisements to reopen the waiting list to new applicants.

Ads appeared in the weekend edition of the New York Post and Sunday's New York Times announcing that Co-op City is "reopening application list" for "2 and 3 bedroom apts only."

According to Edward Aronov, executive manager of Co-op City, the advertisements were one-shot insertions designed to "build up" the waiting lists for two and three-bedroom apartments.

As for one-bedroom apartments, Aronov stated, "We have thousands of applications for the one-bedroom apartments and at the present rate of move-outs, applicants for one-bedroom apartments have to wait for some time before their names are reached."

"The waiting lists for the two and three-bedroom apartments are shorter," Aronov said, indicating he did not know the exact number.

One of the reasons the waiting lists have thinned is the requirement of a $100 nonrefundable deposit for any prospective resident desiring to get his name on the waiting list.

But Aronov said that the $100 requirement "did nothing but eliminate from the list those persons who were not interested enough and not ready to move."

The ads that appeared in the two daily newspapers characterized Co-op City as a city in a "suburban" setting and made a specific appeal to families with young children—"great for kids, nursery through high school on premises, recreational facilities for whole family." It also mentioned three shopping centers, "good transportation" and an express bus to midtown as selling points.

Both ads also stated that moving into Co-op City requires an investment of $450 per room, with an average carrying charge per room of $38 a month that includes central air conditioning, gas and electricity. But it failed to mention the tax reduction.

Both the Times and the Post ads described Co-op City as a "community for family living." The Post advertisement added the word "safe" to the description.

Aronov noted that the majority of residents who have moved out of Co-op City listed the purchase of a house as the reason for leaving. The executive manager said that present difficulties in obtaining house mortgages, a higher interest rate demanded by banks and general upward inflationary costs have dampened interest in purchasing a house among Co-op City families.

OPINION AND ORDER OF JUDGE PIERCE, PAGES 405a-445a

See Appendix B attached to the Petition.

JUDGMENT APPEALED FROM, PAGES 446a-end.

See Appendix C attached to the Petition.

Supreme Court, U. S.
FILED
SEP 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-157

UNITED HOUSING FOUNDATION, INC., *et al.*,

Petitioners,

—v.—

MILTON FORMAN and ELLEN FORMAN, *et al.*,

Respondents,

—and—

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE BERGER
40 West 57th Street
New York, New York 10019
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

TABLE OF CONTENTS

	PAGE
Questions Presented	2
Statement of the Case	2
The Proceedings Below	6
Reasons for Denial of the Petition	6
1. The Case Is Not Yet Ripe for Review	6
2. There Is No Conflict Among the Circuits Which Would Require the Extraordinary Grant of Certiorari to Review an Interlocutory Judgment	7
3. The Court of Appeals Decision Below Follows This Court's Repeated Holdings	8
a. The Decision Follows This Court's Direction that the Securities Laws Be Broadly Construed so as to Give Effect to Their Salutary Purposes	8
b. The Decision Follows This Court's Holdings that "Stock" Is a Security as a Matter of Law	9
c. The Decision Follows This Court's Holdings Defining the Elements of an Investment Contract	10
4. The Decision Below Is Consistent with the Rules and Regulations of the SEC	12
Conclusion	14

PAGE

Table of Authorities

Cases:

Affiliated Ute Citizens v. United States, 406 U.S. 128, *rehearing denied*, 407 U.S. 916 and 408 U.S. 931 (1972) 8

Ashton v. Thornton Realty Co., 346 F. Supp. 1294 (S.D.N.Y. 1972), *aff'd mem.*, 471 F.2d 647 (2d Cir. 1973) 7

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 7

Chicago & N.W. Ry. v. Osborne, 146 U.S. 354 (1892) 7
Commonwealth v. 2101 Cooperative, Inc., 408 Pa. 24, 183 A.2d 325 (1962) 11

Davenport v. United States, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959) 7, 10

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 7
Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971) 12

Movielab, Inc. v. Berkey Photo, Inc., 452 F.2d 662 (2d Cir. 1971) 8

Pine Grove Manor, Inc. v. Director, 68 N.J. Super. 135, 171 A.2d 676 (App. Div. 1961) 3, 6, 11, 12

Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1974) 8

PAGE

SEC v. American Foundation for Advanced Education, 222 F. Supp. 828 (W.D. La. 1963) 10
SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 9, 10
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 9
SEC v. Continental Commodities Corp., No. 73-2429 (5th Cir. July 17, 1974) 8
SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 10
SEC v. W.J. Howey Co., 328 U.S. 293 (1946) 10
Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906 (1961) 10
State ex rel. Russell v. Sweeney, 153 Ohio St. 66, 91 N.E.2d 13 (1950) 11, 12
State ex rel. Troy v. Lumbermen's Clinic, 186 Wash. 384, 58 P.2d 812 (1936) 11
Stockton v. Lucas, 482 F.2d 979 (Temp. Emer. Ct. App. 1973) 7
Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) 8-9

Teherepnin v. Knight, 389 U.S. 332 (1967) 9, 12
1050 Tenants Corp. v. Jakobson, CCH Fed. Sec. L. Rep. ¶ 94,702 (2d Cir. July 8, 1974) 7

Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973) 7

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 4
Wallack v. Davis, CCH Fed. Sec. L. Rep. ¶ 94,622 (S.D.N.Y. June 27, 1974) 7

PAGE

Administrative Rulings:

Lynbrook Gardens Tenants Corp., [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,146 (SEC 1971) 14

Summit House Tenants Corp., [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,611 (SEC 1972) 14

U of F Students Cooperative, Inc., [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,347 (SEC 1971) 11, 14

Regulations:

17 C.F.R. § 230.235 (Rule 235) 12, 13

Securities Act Release No. 5347 (January 4, 1973), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,163 ..... 12, 13

Rule:

Rule 12 FRCP 6

Statutes:

New York Not-For-Profit Corporation Law
L. 1969, ch. 1066, eff. Sept. 1, 1970 4

New York State Mitchell-Lama Act
Private Housing Finance Law §§ 1-59 (McKinney) 2
§ 10 3
§ 22(2) 3
§ 25 3

PAGE

§ 26(1)(b) 3
§§ 40-59 3
§§ 4, 47 (McKinney Supp. 1973) 3

Securities Exchange Act
§ 3(a)(10) 6

Other Authorities:

1 L. Loss, Securities Regulation 492-93 (2d ed. 1961) ..10-11

Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961 3

Note, "Cooperative Housing Corporation and the Federal Securities Laws," 71 Colum. L. Rev. 118 (1971) 11

Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955), *reprinted in part* following N.Y. Private Housing Finance Law § 10 (McKinney) 3

Report of the Real Estate Advisory Committee to the Securities and Exchange Commission (October 12, 1972) 13

R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 130 (2d ed. R. Wolfson & P. Kurland 1951) 7

R. Stern & E. Gressman, Supreme Court Practice § 419 (4th ed. 1969) 7

Zammit, "Securities Law Aspects of Cooperative Housing," 169 N.Y.L.J. No. 5 (January 8, 1973) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-157

UNITED HOUSING FOUNDATION, INC., *et al.*,

Petitioners,

—v.—

MILTON FORMAN and ELLEN FORMAN, *et al.*,

Respondents,

—and—

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari to review an interlocutory judgment of the United States Court of Appeals for the Second Circuit (C1-2)* remanding this action to the United States District Court for trial.

---

* All "A," "B," and "C" references are to the pages of petitioners' appendices.

Questions Presented

1. Whether this case is ripe for review by this Court, where, before an answer has been interposed, the Court of Appeals has merely upheld federal jurisdiction, has made no findings on the merits and has remanded the case to the District Court for further proceedings.

2. Whether the public offering and sale of 1,312,000 shares of common stock to 15,372 purchasers for $32,800,000 cash constitutes the purchase and sale of a "security" within the meaning of the antifraud provisions of the federal securities laws.

Statement of the Case

This action arises out of the public solicitation of venture capital* for the construction of a mammoth cooperative housing development (A3). The respondents, purchasers of the common stock in issue, seek to represent 15,372 purchasers similarly situated, many of whom had invested their life savings in this enterprise (A3-4).

The project was constructed and financed under the New York State Mitchell-Lama Act, N.Y. Private Housing Finance Law §§ 1-59 (McKinney). Central to that statute is

* As the Court of Appeals observed, if the enterprise were to fail, respondents would have lost their entire investment (A18).

the mechanism for substantial* financing** of that housing by the New York State Housing Finance Agency.*** Private Housing Finance Law §§ 40-59.

Pursuant to the statutory scheme, the project had a sponsor, petitioner, United Housing Foundation (UHF),

* By law, this financing was limited to a maximum percentage of the building costs, thereby mandating recourse to public solicitation for the balance of the venture capital. Private Housing Finance Law §§ 22(2), 25 and 26(1)(b). Accord, *Pine Grove Manor, Inc.* v. *Director*, 68 N.J. Super. 13[illegible] 171 A.2d 676 (App. Div. 1961) (cited at A18).

** Petitioners repeatedly refer to substantial state "subsidies" and to the cooperative housing project as a state "subsidized" and even a "social welfare program" (pages 2, 3, 5, 6, 11, 15). In point of fact this is palpably misleading. The Mitchell-Lama Act was designed in part to provide for "State aid, *without cash subsidy provisions*, for the development of housing projects by housing companies formed under this Act." Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955) (emphasis added), *reprinted in part* following N.Y. Private Housing Finance Law § 10 (McKinney), at 8. Indeed, the statute's very purpose was "to clarify the distinction between full-subsidized, low-income public housing programs administered by the State and its municipalities and housing programs undertaken by private entrepreneurs with only limited public assistance, in the form of mortgage loans, aid in land assembly or site acquisition or tax abatement for a limited period." Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961, at 244, 245.

*** Temporary and long term financing of such developments is undertaken by the New York State Housing Finance Agency through the sale of long term tax exempt bonds. The Housing Finance Agency is a separate corporation and its bonds are not full faith and credit bonds of the State of New York. Their tax exempt status results in a lower interest rate than would ordinary corporate bonds, which, in turn, produces an ultimate benefit to the stockholders and residents of the development.

This type of financing is very common in New York; *viz.*, New York State Dormitory Authority, New York State Job Development Authority. See also N.Y. Private Housing Finance Law §§ 44, 47 (McKinney Supp. 1973).

a corporation organized under the New York Membership Corporation Law (95a),* whose membership consists of trade unions and other organizations (A4). The general contractor and sales agent for the project was petitioner Community Services, Inc. (CSI), a corporation organized for profit under the New York Business Corporation Law and a wholly-owned subsidiary of UHF (A4). The co-operative housing corporation, Riverbay Corporation (Riverbay) whose common stock was sold to the respondents, owns the land and buildings constituting the project (A4). The individual petitioners herein, officers and directors of Riverbay, are also directors or officers, or both, of UHF and CSI (A5). Consequently, Riverbay is and was under the domination and control of UHF and CSI (A5).

Just as with every other large-scale public offering, the sale of Riverbay common stock was promoted by means of a prospectus, called in this instance an "Information Bulletin." ** The Information Bulletin***

> "[I]nvite[d] offers for shares of [Riverbay's] capital stock and/or other equity obligations for sale in units

* Page numbers appearing in parentheses followed by the letter "a" refer to pages in the printed appendix filed by respondents in the Court below. The reference at A4 to UHF's being incorporated in 1951 under the New York Not-For-Profit Corporation Law is an obvious, but immaterial, error as the statute was not enacted until 1969. L. 1969, ch. 1066, eff. Sept. 1, 1970.

** Since the petitioners moved to dismiss the amended complaint prior to answer, the allegations as to fraudulent statements and material omissions must be deemed true. See, e.g., *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-75 (1965). Consequently, respondents shall not develop the facts thereof in this brief, but merely refer this Court to pages 8-19 of our principal brief in the Court of Appeals therefor.

*** There was also a revised Information Bulletin, but it had the identical language.

> which will be allocated to the 15,500 [revised to 15,372] apartments of the development all in accordance with the terms of the subscription agreement" (178a).

The subscription agreement commenced:

> "RIVERBAY CORPORATION
>
> Subscription Agreement and Apartment Application
>
> (Limited to Residents of the State of New York)
>
> (1) I, (we) ....., hereinafter individually and collectively called the 'Subscriber,' hereby subscribe at the par value and principal amount thereof, to an aggregate of:
>
> [Price of stock depending upon type of apartment chosen and calling upon subscriber to select the desired unit]
>
> par value of Class B capital stock of RIVERBAY CORPORATION, . . . for the purpose of acquiring land and constructing and operating a housing project . . . ." (104a-105a).

Each subscriber agreed to purchase 18 shares of Riverbay stock at $25 par value per share for each room in the apartment, for an initial purchase price amounting to $450 per room (A5).*

Among the economic inducements set forth in the Information Bulletin to generate the respondents' interest in the purchase of Riverbay's common stock was (a) each purchaser's right to take income tax deductions for his pro

* The total purchase price was fixed at $3,856 per room (347a), but was raised to $5,737 per room (353a) as a result of the fraudulent conduct set forth in the amended complaint.

rata share of Riverbay's interest expense and real estate taxes (175a); (b) the purchaser's right to share in income from the leasing of retail establishments, office space, parking and other commercial enterprises (169a) and, (c) of at least equal importance, the opportunity to obtain desirable housing accommodations at a cost lower than the market price in New York City (166a) (A16-17).

The incidents of ownership of Riverbay common stock are, in most respects, identical to those obtaining with respect to stock of other real estate corporations. They are summarized in the decision of the Court of Appeals at A10-11. See also, *Pine Grove Manor, Inc.* v. *Director, supra.*

The Proceedings Below

Respondents filed their amended complaint in October, 1972. Prior to answer, petitioners moved, pursuant to Rule 12 FRCP, for a dismissal thereof for lack of federal jurisdiction (B4). The District Court dismissed the complaint on the ground that Riverbay stock was neither "stock" nor an "investment contract" within the meaning of § 3(a)(10) of the Securities Exchange Act (B4). The Court of Appeals unanimously reversed on both grounds (A20), upheld federal jurisdiction, and remanded the case to the District Court for further proceedings (A22, C2).

Reasons for Denial of the Petition

1. *The Case Is Not Yet Ripe for Review.*

On the petitioners' motion prior to answer, the United States District Court dismissed the amended complaint for "lack of subject matter jurisdiction" (B29). The United States Court of Appeals "[e]xpressing no opinion whatsoever on the merits," nevertheless "reversed" and "remanded . . . for further proceedings in accordance with [its] opinion . . . ." (A3, C2).

Consequently, the judgment sought to be reviewed is not final, but interlocutory and is therefore not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 130, at 232-33 (2d ed. R. Wolfson & P. Kurland 1951); R. Stern & E. Gressman, Supreme Court Practice § 4.19, at 180 (4th ed. 1969). See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Chicago & N.W. Ry.* v. *Osborne*, 146 U.S. 354, 355 (1892).

2. *There Is No Conflict Among the Circuits Which Would Require the Extraordinary Grant of Certiorari to Review an Interlocutory Judgment.*

Contrary to petitioners' assertion (pages 17-20), every Federal Court which has considered the question, whether stock in a real estate or other cooperative corporation is a "security" has held either directly or implicitly that it is a security. See *1050 Tenants Corp.* v. *Jakobson*, CCH Fed. Sec. L. Rep. ¶ 94,702 (2d Cir. July 8, 1974); *Ashton* v. *Thornton Realty Co.*, 346 F. Supp. 1294 (S.D.N.Y. 1972), *aff'd mem.*, 471 F.2d 647 (2d Cir. 1973); *Davenport* v. *United States*, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); *Stockton* v. *Lucas*, 482 F.2d 979 (Temp. Emer. Ct. App. 1973); *Wallack* v. *Davis*, CCH Fed. Sec. L. Rep. ¶ 94,622 (S.D.N.Y. June 27, 1974).

The authorities cited by petitioners (pages 19 and 20) all deal with promissory notes given in commercial loan transactions, with the exception of *Vincent* v. *Moench*, 473 F.2d 430 (10th Cir. 1973), which deals only with the transfer

of a partnership interest. (*Sanders* v. *John Nuveen & Co.*, 463 F.2d 1075 (7th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1974) and *SEC* v. *Continental Commodities Corp.*, No. 73-2429 (5th Cir. July 17, 1974) both held the notes in issue to be securities.) Even so, it is absolutely clear from a reading of these cases that it is only those promissory notes which are given in short-term commercial loan transactions that are not deemed to be securities, as opposed to promissory notes which are sold for purposes of investment, and which are held to be securities. The complete inapplicability of the commercial promissory note cases to the instant situation involving the massive public solicitation of $32,800,000 of venture capital through the sale of common stock is too obvious to require extended comment. See also *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F.2d 662 (2d Cir. 1971).

This case, therefore, presents no conflict with any other decision of a Circuit Court which would require resolution by this Court, especially upon a record in which the petitioners have not even joined issue with the amended complaint.

3. *The Court of Appeals Decision Below Follows This Court's Repeated Holdings.*

a. The Decision Follows This Court's Direction that the Securities Laws Be Broadly Construed so as to Give Effect to Their Salutary Purposes.

This Court has directed repeatedly that the securities laws are to be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151, *rehearing denied*, 407 U.S. 916 and 408 U.S. 931 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty*

Co., 404 U.S. 6, 12 (1971); *Tcherepnin* v. *Knight*, 389 U.S. 332, 338 (1967); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963). The Court of Appeals, by upholding federal jurisdiction in this action alleging fraud in the sale of over one million shares of common stock to 15,372 purchasers for $32,800,000, has expressly followed that direction (A14).

b. The Decision Follows This Court's Holdings that "Stock" Is a Security as a Matter of Law.

This Court has construed the definitional sections of the Securities Laws on two occasions, first in *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), and again in *Tcherepnin* v. *Knight, supra*. In *Joiner*, this Court held:

> "In the Securities Act the term 'security' was defined to include by name or description many documents in which there is common trading for speculation or investment. *Some, such as* notes, bonds, and *stocks*, are pretty much standardized and *the name alone carries well settled meaning. . . . Instruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description.*" 320 U.S. 344, 351 (emphasis added).

This construction was reaffirmed in *Tcherepnin, supra* at 339. The Court of Appeals in this case quoted the aforementioned statement from *Joiner*, and concluded:

> "This language gives support to the proposition that if a given instrument is a share of stock 'on its face' it is literally within the ambit of the statute" (A12).

c. The Decision Follows This Court's Holdings Defining the Elements of an Investment Contract.

The Court of Appeals held that Riverbay stock was also an " 'investment contract' " (A20). In so holding, the Court squarely applied the classic definition of an "investment contract" which this Court expressed in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) as follows:

> "In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . . " (A15).

Petitioners in challenging this aspect in the decision below argue only that the "profit" element is missing here (pages 20-23). In so doing, they "mechanically" (A15) and erroneously insist that "expectation of profit" encompasses solely the expectation of capital gain. Neither this Court nor any other court has ever so held. Quite to the contrary, the Court of Appeals correctly observed that this Court has made it clear that the term "profit" is to be applied with common sense and in practical usage to denote "economic inducement," *i.e.*, the expectation of economic benefit, citing *SEC* v. *C.M. Joiner Leasing Corp.*, *supra* at 352-53 and *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967) (A15).

The identical analysis has been made by every court and commentator to consider the term "profit." See, e.g., *Davenport* v. *United States*, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); *SEC* v. *American Foundation for Advanced Education*, 222 F. Supp. 828 (W.D. La. 1963); *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P.2d 906 (1961) (Traynor, J.); 1 L. Loss, Securities Regulation 492-93 (2d ed. 1961); Zammit, "Securities Law Aspects of Cooperative Housing," 169 N.Y.L.J. No. 5, at 1, col. 3 (January 8, 1973); Note, "Cooperative Housing Corporations and the Federal Securities Laws," 71 Colum. L. Rev. 118, 129-31 (1971); *State ex rel. Troy* v. *Lumbermen's Clinic*, 186 Wash. 384, 394-95, 58 P.2d 812, 816 (1936); *Pine Grove Manor, Inc.* v. *Director*, 68 N.J. Super. 135, 171 A.2d 676, 684 (App. Div. 1961); *Commonwealth* v. *2101 Cooperative, Inc.*, 408 Pa. 24, 183 A.2d 325, 334 (1962); *State ex rel. Russell* v. *Sweeney*, 153 Ohio St. 66, 91 N.E.2d 13, 16 (1950).

The economic inducements or benefits offered to purchasers of Riverbay stock were, as the Court of Appeals held, substantial and real. They included: (1) the opportunity to share in income from rental of stores, office space, parking and other commercial enterprises (a total of over $4,000,000 annual income),* (2) the right to deduct for income tax purposes a pro rata share of the mortgage interest and real estate taxes paid by Riverbay, and (3) a very real reduction of expense which the purchasers would otherwise incur for the rental of comparable housing accommodations (A16-17). It should be noted that the economic inducement for many stock investments is the tax shelter, loss carry over, depreciation or depletion allowance, or other tax advantages which are available under the Internal Revenue Code and not primarily for either capital gain or ordinary income purposes.

Petitioners argue alternatively that the antifraud provisions of the federal securities laws should not be applied with respect to the sale of Riverbay's common stock be-

* This income would be transmitted to respondents in the form of a reduced monthly carrying charge or as a dividend (A16). Cf. *U of F Students Cooperative, Inc.*, [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,347 (SEC 1971).

cause UHF, the promoter-sponsor of this gigantic financial venture, is not a profit-making enterprise and because the construction, operation and sale of the development is subject to state supervision (page 2).* Petitioners thus seek to use their professed "eleemosynary" intent to excuse fraudulent conduct, under the familiar but misguided hypothesis, that the end, if socially desirable, justifies the means employed. Those contentions were rejected emphatically by the Court of Appeals as being both immaterial to the application of the antifraud provisions of the securities laws and erroneous in fact at A18-19.

4. *The Decision Below Is Consistent with the Rules and Regulations of the SEC.*

Contrary to petitioners' contention (pages 24-26), there is absolutely no inconsistency between the decision below and the Rules and Regulations of the SEC. As the Court below held, the SEC by its Rule 235, 17 C.F.R. § 230.235, which exempted certain smaller housing cooperatives from *registration,* implicitly recognized that the stock of a cooperative housing corporation was a security (A14).**

Securities Act Release No. 5347 (January 4, 1973), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,163, relied upon by petitioners (page 24), expressly applies only

---

* At various places in the petition, UHF incorrectly describes itself as "a nonprofit foundation" and "a nonprofit corporation" (pages 4 and 6) (*vide, infra*). For judicial rejection of parallel reasoning, see *Pine Grove Manor, Inc.* v. *Director, supra; Commonwealth* v. *2101 Cooperative, Inc., supra; State ex rel. Russell* v. *Sweeney, supra.*

** It is axiomatic that an exemption from registration does not carry with it an exemption from the antifraud provisions of the federal securities laws. See, e.g., *Tcherepnin* v. *Knight,* 389 U.S. 332, 344 (1967); *Hill York Corp.* v. *American Int'l Franchises, Inc.,* 448 F.2d 680, 695 (5th Cir. 1971).

to "condominiums and other types of similar units." In fact, the release was issued to clarify the "uncertainty about when offerings of condominiums and other types of similar units may be considered to be offerings of securities" for purposes of registration, not fraud. There was no need to clarify the status of offerings of shares of cooperative real estate corporations, as opposed to condominium realty interests, because those offerings were already the subject of Rule 235. Indeed, that rule is not even mentioned in Release No. 5347. Petitioners' further contention that the Real Estate Advisory Committee to the SEC recommended that condominiums and cooperatives should be subject to the same rules (page 24) misses the mark. Even if that Committee did recommend that the SEC alter its view with respect to the registration of cooperatives' securities, the SEC did not accept that recommendation. To the contrary, the treatment of cooperative shares remains precisely as the Real Estate Advisory Report described it:

> "Occupancy interests in cooperative housing are currently viewed as 'securities', primarily because such interests are represented by 'stock'." Report of the Real Estate Advisory Committee to the Securities and Exchange Commission 90, n.26 (October 12, 1972).

There was no recommendation that cooperative shares be exempted from the antifraud provisions of the securities laws.

Consequently, there is no reason for petitioners' feigned concern (pages 15-16). The decision below did not have any "enormous" impact on the real estate industry or constitute a "substantial impediment" to government-sponsored housing. Ever since the adoption of Rule 235 in 1961,

it has been recognized that the SEC considered stock in cooperative realty corporations to be a security for purposes of registration.* The decision below makes no change in that rule and it creates no confusion. It merely announces in clear terms to real estate developers and state agencies that they should make complete and truthful disclosures to prospective purchasers in accord with federal standards of lawful conduct in connection with the solicitation of venture capital to construct residential housing. If that is the "enormous impact" of the decision below, it is long overdue.

CONCLUSION

For the reasons above set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE BERGER
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

---

* There are numerous reported requests for no-action letters on cooperative housing offerings. See, e.g., *Lynbrook Gardens Tenants Corp.*, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,146 (SEC 1971); *Summit House Tenants Corp.*, [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,611 (SEC 1972); cf. *U of F Students Cooperative, Inc.*, [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,347 (SEC 1971).

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-157

UNITED HOUSING FOUNDATION, INC. *et al.*,
Petitioners,

v.

MILTON FORMAN and ELLEN FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,
Additional Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
Attorney for Petitioners

MARTIN LONDON
GEORGE P. FELLEMAN
ALAN G. BLUMBERG
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-157

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN and ELLEN FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,
Additional Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

Petitioners submit this memorandum in reply to new matters raised by respondents in their brief in opposition to the Petition for Certiorari.

1. The respondents incorrectly argue that the judgment of the Court of Appeals is not ripe for review because it is interlocutory (R 6-7).* However, this Court has frequently reviewed interlocutory judgments involving issues " 'fun-

* References to the respondents' brief appear as: (R 11); and to the printed appendices filed with this Court as: (A 16).

damental to the further conduct of the case,'" particularly judgments, such as this, involving important questions of federal court jurisdiction.* *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n. 2 (1947); R. Stern & E. Gressman, *Supreme Court Practice* §4.19 at 180-81 (4th ed. 1969). And see *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 146-47 (1965), cited in the Petition. Indeed, notwithstanding the interlocutory status of this case, the Court of Appeals for the Second Circuit recognized the possibility of Supreme Court review of this jurisdictional question and stayed the issuance of its mandate pending this Court's disposition of the Petition for Certiorari.

2. As described in the Petition, the decision below substantially undermines the long-established definition of an investment contract under the federal securities laws. Attempting to explain that decision, respondents argue that the Court of Appeals held that profit "inducements, . . . offered to purchasers . . ." were "substantial and real" (R 11). That is a significant distortion of the findings of the Court of Appeals and underscores the confusion the decision has generated and the need for review by this Court.

The Court of Appeals, like the District Court, did not find that petitioners made any promises or inducements of profits; rather, it found that elements of "profit"—as it incorrectly construed that term—might be available to cooperative members. Thus it found not the promise of profits, but that cooperative members may in fact share in

* None of the cases cited by respondents involves the review of a jurisdictional question.

rental income from the cooperative's commercial facilities, may take advantage of certain tax benefits, and probably pay lower-than-market housing costs (A 16-17).* But those benefits (which were not used to induce the purchase of the cooperative memberships) are remote from the profit inducement and economic lure which this Court has held to be indispensable elements of an investment contract.**

3. SEC Rule 235, 17 C.F.R. §230.235, relied upon by respondents, does not "implicitly recognize . . . that the stock of a cooperative housing corporation [is] a security" (R 12). Rather, as noted by Professor Loss, "it would be too facile to argue that [Rule 235] proves conclusively that [cooperative] shares are securities under either the 1933 Act or 1934 Act." 1 Loss, Securities Regulation 493-94 (1961). The District Court properly concluded that Securities Act Release No. 5347, not Rule 235, represents the more current and considered view of the SEC.†

And, contrary to respondents' argument, Securities Act Release No. 5347 expressly refers to "condominium and cooperative unit[s]," (D 11) and not just to condominiums. And even if respondents were correct that Securities Act Release No. 5347 applies only to condominiums, a funda-

* Further, although respondents asserted in their Statement of the Case that petitioners set forth these inducements in their Information Bulletins (R 5-6), the very pages of the Bulletin cited by respondents do not promise any commercial rental income, specifically warn that there is no promise of tax deductions, and refer not to below-market housing prices but to "decent housing at a reasonable price."

** See discussion and cases cited in the Petition, pp. 20-23.

†". . . [T]he S. E. C. itself has refined its thinking and is now seeking to narrow its interpretation of the scope of the securities acts to those housing enterprises where all three-prongs of the *Howey* [investment contract] test are present" (B 29). Moreover, the courts are not bound by an administrative determination, such as Rule 235, which has never been tested in court. *SEC* v. *Sterling Precision Corp.*, 393 F.2d 214, 220 (2d Cir. 1968). See also comment of the District Court at B 28-29.

mental conflict remains, since the sweeping decision below defines the "profit" prong of the investment contract test in a manner expressly rejected by the Release. There is no rational basis for holding that "profit" necessary for an investment contract has one definition when applied to a cooperative and an inconsistent definition when applied to a condominium. The considerable confusion generated by this conflict, as reflected in the recent professional and industry literature, is all the more reason for this Court to review the judgment of the Court of Appeals.

4. Respondents have grossly distorted the facts and posture of this case in arguing that petitioners seek to use their "professed 'eleemosynary'" status to excuse fraudulent conduct (R 11-12).*

That is an irresponsible argument. Respondents deal violently with the record and petitioners' argument by suggesting that they will be deprived of a forum to air their alleged claims if this Court agrees that the federal courts lack jurisdiction. The issue in this case has always been whether respondents' claims should be litigated in the state, rather than federal, courts.** That issue involves

* Contrary to respondents' baseless claim, petitioner United Housing Foundation is, as both the District and Circuit Courts found, a nonprofit corporation.

** It should be noted that this case could be litigated in the New York State courts without the difficult and complex Eleventh Amendment problem created by respondents' joinder as defendants of the State of New York and the New York State Housing Finance Agency. In this regard, the petition of the State of New York and the New York State Housing Finance Agency for rehearing in the Court below was denied on September 12, 1974, and we are advised that they plan to petition this Court for a writ of certiorari. Because of the significant constitutional questions present in this case by reason of the State's involvement as a defendant, this Court might wish to defer consideration of this petition until the State has filed and all parties are before the Court.

an important and unsettled question of federal court jurisdiction which should be decided by this Court.

Conclusion

The substantial and important jurisdictional question raised by this case cannot be obscured by respondents' description of the issue as insignificant and well settled.

Did Congress, in enacting the Securities Act of 1933 and the Securities and Exchange Act of 1934, intend to sweep within their ambits purchases and sales of state-subsidized and regulated private residences built by nonprofit agencies, pursuant to state housing programs? That issue is of signal importance to state and municipal governments, the private housing industry and the administration of the federal securities laws. It deserves resolution by this Court.

Dated: New York, New York
September 26, 1974.

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
Attorney for Petitioners

MARTIN LONDON
GEORGE P. FELLEMAN
ALAN G. BLUMBERG
Of Counsel

Supreme Court, U. S.
MAR 6 1975

IN THE

Supreme Court of the United States

October Term, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents.

BRIEF FOR PETITIONERS UNITED HOUSING FOUNDATION, INC., *et al.*

Simon H. Rifkind
345 Park Avenue
New York, New York 10022
(212) 644-8602

Attorney for Petitioners
United Housing Foundation, Inc., et al.

Martin London
George P. Felleman
Marshall Beil
Carol Goodman
Alan G. Blumberg
Of Counsel

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Opinions Below	1
Jurisdiction of This Court	2
Statutes and Rule Involved	2
Question Presented	3
Statement of the Case	4
The Parties and Proceedings Below	5
The Factual Background	7
The Co-op City Memberships	10
The Decisions Below	13
Summary of Argument	15
Argument	
I—The Literal Approach to the Definition of a Security Is Contrary to Congressional Intent and Judicial Decision	17
A. Congressional intent requires that commercial context be considered	18
B. Judicial decisions adopt a pragmatic, not a literal, approach	20
II—Co-op City Memberships Are Not Investment Contracts	24
A. There was no inducement of profit	25

PAGE

B. There is no expectation of profit 27

1. Rents from commercial facilities are not profit 28

2. Tax deductions are not profit 30

3. "Saving of an expense" is not profit 31

C. Under SEC guidelines, Co-op City memberships are not investment contracts ... 33

III—This Court Should Not Extend Jurisdiction of the Securities Laws to State Regulated Housing Cooperatives Without a Clear Congressional Mandate 38

A. Low and middle income housing is a matter of great state concern and pervasive state regulation 38

B. Federal statutes should not be extended to an area of great state concern without a clear congressional mandate 39

C. Federal housing legislation is inconsistent with securities law jurisdiction 42

D. Congress is best suited to decide whether and in what manner housing cooperatives should be federally regulated 45

Conclusion 48

TABLE OF AUTHORITIES

PAGE

Cases:

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 41

Bellah v. First National Bank of Hereford, 495 F.2d 1109 (5th Cir. 1974) 23

CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961) 21
Cabell v. Markham, 148 F.2d 737 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) 21
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 21
C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc., CCH Fed. Sec. L. Rep. ¶94,938 (7th Cir. Jan. 13, 1975) 22
Collins v. Baylor, 302 F.Supp. 408 (N.D. Ill. 1969) 20
Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) 26

Forman v. Community Services, Inc., 366 F. Supp. 1117 (S.D.N.Y. 1973), *rev'd*, 500 F.2d 1246 (2d Cir. 1974) 2
Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974) 1

Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cir. 1974) 25, 32

Kavitt v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974) 47
Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) 21, 22

Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973) 22

McClure v. First National Bank of Lubbock, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, —— U.S. —— (1975) 22

PAGE

Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093 (5th Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) 25

Palmer v. Massachusetts, 308 U.S. 79 (1939) 40
Park Place, Inc., 57 T.C. 767 (1972) 30
People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. N.Y. Co. 1972) 39

Rewis v. United States, 401 U.S. 808 (1971) 40
Ryan v. J. Walter Thompson Co., 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972) 47

SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) 24, 25, 34
SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973) 26
SEC v. Haffenden-Rimar International, Inc., 496 F.2d 1192 (4th Cir. 1974), *aff'g* 362 F. Supp. 323 (E.D. Va. 1973) 25, 32
SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974) 25
SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 25
SEC v. W. J. Howey Co., 328 U.S. 293 (1946) 24, 25, 27, 28, 31
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 47

Tcherepnin v. Knight, 389 U.S. 332 (1967) 19, 20, 24
1050 Tenants Corp. v. Jakobson, 503 F.2d 1375 (2d Cir. 1974) 18, 31
Thorp Commercial Corp. v. Northgate Industries, Inc., CCH Fed. Sec. L. Rep. ¶94,929 (D. Minn. Dec. 4, 1974) 23

PAGE

United States v. Bass, 404 U.S. 336 (1971) 40
United States v. Wittek, 337 U.S. 346 (1949) 41
United Steel Workers of America v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) 47

Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973) 23

Wilko v. Swann, 346 U.S. 427 (1953) 47

Constitutional Provision, Statutes and Rules

Federal:

United States Constitution, Amendment XI 4

28 U.S.C. §1254(1) 2
28 U.S.C. §1331 7
28 U.S.C. §1343 7
42 U.S.C. §1983 7
42 U.S.C. §1988 7
42 U.S.C. §3532(b) 46

Internal Revenue Code, Section 216, 26 U.S.C. §216 ..... 29, 30

Interstate Land Sales Disclosure Act
15 U.S.C. §§1701-1720 43
15 U.S.C. §1715(a) 44

Housing and Urban Development Act of 1974
Section 101, 42 U.S.C. §5301 46
Section 201(a), 42 U.S.C. §1437 46
Section 802(a), 42 U.S.C. §1440(a) 46
Section 821, 42 U.S.C. §3532 42

National Housing Act, 12 U.S.C. §§1701 et seq. 44

Real Estate Settlement Procedures Act of 1974, P.L. No. 93-533 (Dec. 22, 1974)
Section 3 43
Section 4 43

PAGE

Section 5 43
Section 6 ..... 43, 46
Section 8 46
Section 9 46
Section 14 ..... 43, 46
Section 16 46
Section 18 46

Securities Act of 1933
Section 2(1), 15 U.S.C. §77(b)(1) ..... 2, 19, App. 1
Section 17(a), 15 U.S.C. §77q(a) ..... 2, App. 1
Section 22(a), 15 U.S.C. §77v(a) ..... 2, App. 2

Securities Exchange Act of 1934
Section 2, 15 U.S.C. §78b 19
Section 3(a)(10), 15 U.S.C. §78c(a)(10) ..... 2, 18, App. 3
Section 3(a)(14), 15 U.S.C. §78c(a)(14) 21
Section 10(b), 15 U.S.C. §78j(b) ..... 2, App. 4
Section 16(b), 15 U.S.C. §78p(b) 21
Section 27, 15 U.S.C. §78aa ..... 2, App. 4

SEC Rule 10b-5, 17 C.F.R. 240.10b-5 ..... 2, App. 5
SEC Rule 235, 17 C.F.R. 230.235 33–36
Truth-in-Lending Act, Section 123, 15 U.S.C. §1633 46

New York:

N.Y. General Business Law §§352-e, 352-i 39

N.Y. Private Housing Finance Law §§10-59 5
N.Y. Private Housing Finance Law §11 38
N.Y. Private Housing Finance Law §11-a 38, 39
N.Y. Private Housing Finance Law §12(5) 29
N.Y. Private Housing Finance Law §31 10
N.Y. Private Housing Finance Law §31-a 11, 27
N.Y. Private Housing Finance Law §32(5)-(7) 39

PAGE

Legislative Material

Federal:

Building the American City, Report of National Commission on Urban Problems to Congress and the President, H.R. Doc. 91-34, 91st Cong., 1st Sess. (1968) 5, 45, 46
77 Cong. Rec. 2916-19 (1934) 19
78 Cong. Rec. 2270-71, 7689-90, 7717, 7921, 8163-64, 8175, 8387 (1934) 19
120 Cong. Rec. 5371, 93d Cong., 2d Sess. (daily ed. June 20, 1974) 42
Hearings on H.R. 7852 and 8720 before House Interstate and Foreign Commerce Comm., 73d Cong. (1934) 41
Hearings on S. Res. 84 (72d Cong.) and S. Res. 56, 57, 73d Cong., pt. 15 (1934) 41
H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 19, 20
H.R. Rep. No. 93-1177, 93d Cong., 2d Sess. (1974) 43
S. Rep. No. 47, 73d Cong., 1st Sess. (1934) 41
S. Rep. No. 792, 73d Cong., 2d Sess. (1934) 19, 20
S. Rep. No. 1631, 77th Cong., 2d Sess. (1942) 30
S. Rep. No. 892, 81st Cong., 1st Sess. (1949) 45
S. Rep. No. 1286, 81st Cong., 2d Sess. (1950) *in* 1950 U.S. Code Cong. Serv. 2021 45
S. Rep. No. 1123, 90th Cong., 2d Sess. (1968) 44
S. Rep. No. 93-866, 93d Cong., 2d Sess. (1974) 46

New York:

Note of Commission, *reprinted* at N.Y. Private Housing Finance Law §10 at 9 (McKinney 1962) 38

PAGE

SEC Releases, Report and No-Action Letters

Releases:

[Multi-level Distributorships and Pyramid Sales Plans], SEC Securities Act Release No. 5211 (Nov. 30, 1971), 1 CCH Fed. Sec. L. Rep. ¶1048 26
Offers and Sales of Condominiums or Units in a Real Estate Development, SEC Securities Act Release No. 5347 (Jan. 4, 1973) 26, 29, 30, 32, 36, 37
SEC Securities Act Release No. 5018 (Nov. 4, 1969), 1 CCH Fed. Sec. L. Rep. ¶1047 32

Report:

Report of the Real Estate Advisory Committee to the Securities and Exchange Commission (Oct. 12, 1972) 34–36

No-Action Letters:

Clemson Properties, Inc., SEC No-Action Letter, Aug. 13, 1971 [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,387 37
McCulloch Properties, Inc., SEC No-Action Letter, Aug. 30, 1973 (avail. Oct. 1, 1973) 37
900 Park Ave. Corp., SEC No-Action Letter, June 9, 1972 (avail. July 10, 1972) 33
Society Hill Towers, Inc., SEC No-Action Letter, Dec. 27, 1974, CCH Fed. Sec. L. Rep. ¶80,103 36
Stoneridge Golf and Country Club, SEC No-Action Letter, Jan. 3, 1975 (avail. Feb. 2, 1975), *noted in* BNA Sec. Reg. L. Rep. No. 289 at C-1-2 (Feb. 12, 1975) 27
Summit House Tenants Corp., SEC No-Action Letter, Jan. 6, 1972 [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,611 33

PAGE

Articles

Dickey and K-Thorpe, *Federal Security Regulation of Condominium Offerings*, 19 N.Y.L. Forum 473 (1974) 34
Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 21
Innovations Modifying Apartment Design, N.Y. Tmes, Feb. 23, 1975, sec. 8, p. 10, col. 2 23
1 Loss, Securities Regulation (1961) 24, 34
Miller, *Cooperative Apartments: Real Estate or Securities?*, 45 Boston U.L. Rev. 465 (1965) 31
N.Y.L.J., Jan. 15, 1975, p. 6, col. 6 42
N.Y. Times, Feb. 13, 1975, p. 38, col. 1 42
Recent Development, 62 Georgetown L.J. 1515 (1974) 34

IN THE

Supreme Court of the United States

October Term, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents.

BRIEF FOR PETITIONERS UNITED HOUSING FOUNDATION, INC., *et al.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 500 F.2d 1246 (2d Cir. 1974), is reprinted as Appendix A to the petition for cer-

tiorari in No. 74-157.[1] The opinion of the United States District Court for the Southern District of New York, reported at 366 F.Supp. 1117 (S.D.N.Y. 1973), is reprinted as Appendix B to the petition in No. 74-157.

Jurisdiction of This Court

The judgment of the Court of Appeals (P-C1-2) was entered on June 12, 1974. The petition for certiorari in No. 74-157 was docketed on August 22, 1974. The petition in No. 74-647 was docketed on November 22, 1974. This Court granted the writ and consolidated the cases on January 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Rule Involved

This case involves Sections 2(1), 17(a) and 22(a) of the Securities Act of 1933, 15 U.S.C. §§ 77b(1), 77q(a) and 77v(a); Sections 3(a)(10), 10(b) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(a)(10), 78j(b) and 78aa; and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. 240.10b-5, the texts of which are set forth in pertinent part in the appendix to this brief.

---

1. References to the appendices to the petition for certiorari in No. 74-157 are prefaced by "P-" followed by the appendix letter and page number, *e.g.*, (P-A10). References to the Single Appendix in this case are designated by "A" followed by the page number, *e.g.*, (A2). References to the appendix submitted to the Court of Appeals below are designated by the page number followed by "a," *e.g.*, (160a).

Question Presented

Is a membership in a cooperative housing corporation, to which neither the promise, the expectation nor the possibility of profit attaches, a "security" as defined in the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act")—(collectively, the "securities laws")—particularly when it arises out of the following circumstances:

1. A state legislature determines, as a matter of social policy, to take state action to remedy a serious housing shortage for low and middle income groups and adopts legislation to encourage the construction of low and middle income housing by furnishing substantial subsidies;

2. Under that legislation, a nonprofit foundation composed of labor unions, housing cooperatives and civic groups sponsors a massive nonprofit cooperative housing development, the planning, construction and initial management of which is pervasively controlled by the State in accordance with the statutory scheme;

3. Membership in the cooperative corporation:

(a) is purchased solely in order to secure a personal residence;

(b) is accompanied neither by promise of profit by the seller nor expectation of profit by the buyer;

(c) can be resold only when the member moves out and only for exactly the price paid; and

(d) is evidenced by two instruments: (i) a lease entitling the member to occupy a specific apartment, and (ii) a certificate called "stock" which reflects the member's participation in the residential cooperative corporation?

The State of New York and The New York State Housing Finance Agency, petitioners in No. 74-647, raise, as an additional question, their immunity to suit in federal court under the securities laws and the Eleventh Amendment to the United States Constitution, discussed in their separate brief.

Statement of the Case

The issue before this Court is whether a federal court has jurisdiction to hear a dispute over increases in monthly carrying charges (rent) for residents of a state financed and regulated low and middle income housing cooperative. The Court of Appeals for the Second Circuit, reversing the District Court for the Southern District of New York, decided that this case was properly in the federal courts. It held that membership in a nonprofit low and middle income cooperative housing corporation built pursuant to an emergency state housing program, and with respect to which profit incentives—as that term is ordinarily understood—are totally absent, is nevertheless a "security" as defined by the securities laws.

This unprecedented decision superimposes federal jurisdiction upon a complex state social welfare program available exclusively to low and middle income families. It

construes the statutes at issue in a manner expressly rejected by other Courts of Appeals. It creates a new class of federal litigants by misapplying statutes designed to regulate conduct in the investment marketplace. It undermines the definition of an investment contract established by this Court and conflicts with published guidelines of the Securities and Exchange Commission. Finally, it intrudes federal law into an area of important state concern without congressional sanction and is, indeed, inconsistent with recent congressional enactments in the field of cooperative housing.

The Parties and Proceedings Below

Respondents are 57 residents of Co-op City, a massive low and middle income cooperative housing development located in Bronx County, New York City, and built under New York State's pioneering Mitchell-Lama Housing Law.[2] Respondents instituted this action purportedly on behalf of a class consisting of all the owners of Co-op City's more than 15,000 apartments, and derivatively on behalf of the cooperative corporation.

Petitioner United Housing Foundation, Inc. ("UHF"), the sponsor of Co-op City, is a nonprofit membership corporation composed of labor unions, housing cooperatives and other civic groups (160a). Founded in 1951, it is widely regarded as a pioneer and leader in the development of low and middle income housing cooperatives[3] and has

2. N.Y. Private Housing Finance Law §§10-59 ("Housing Law").

3. *Building the American City*, Rep. of Nat'l Comm'n on Urban Problems to Congress and the President, H.R. Doc. 91-34, 91st Cong., 1st Sess. 136-39 (1968).

sponsored numerous cooperative developments under the Housing Law and related statutes.[4]

Petitioner Community Services, Inc. ("CSI"), is a wholly-owned subsidiary of UHF and acts as general contractor and sales agent for UHF-sponsored cooperatives. The individual petitioners are some of the officers and directors of UHF, CSI and Riverbay Corporation, the cooperative housing company organized under the Housing Law to own and operate Co-op City.

Petitioner The State of New York (the "State"), through its Division of Housing and Community Renewal, controlled and supervised all aspects of the planning and construction of Co-op City and continues to control and supervise its operation. Petitioner The New York State Housing Finance Agency (the "Agency") is a corporate governmental agency of the State. It furnished a forty year, low interest mortgage loan to Riverbay Corporation to finance the construction of the development.

Respondents instituted this action in September 1972 in the United States District Court for the Southern District of New York, seeking reduction of their monthly carrying charges, money damages and other relief. Federal jurisdiction was based on two claims alleging violations of anti-fraud provisions of the securities laws. In essence, these claims charge that Information Bulletins (159-200a) distributed by petitioners misled prospective cooperative members with respect to construction costs and estimated

4. UHF has sponsored Rochdale Village in Queens; Amalgamated Warbasse Houses in Brooklyn; Penn Station South, Seward Park Houses and East River Houses in Manhattan; and other projects (67a).

monthly carrying charges. Ten state-law claims are joined in the complaint under the doctrine of pendent jurisdiction.[5]

In December 1972, petitioners moved to dismiss the complaint on the ground that Co-op City cooperative memberships were not "securities" as defined in the securities laws and that, accordingly, the court lacked subject matter jurisdiction. The State and Agency also moved to dismiss the complaint as to them on the grounds that they were immune from such suit in federal court and were not persons under 42 U.S.C. §1983. The District Court granted petitioners' motions with respect to subject matter jurisdiction[6] and dismissed the complaint in its entirety.

Respondents appealed, and on June 12, 1974, the Court of Appeals for the Second Circuit reversed. It held that there was subject matter jurisdiction because Co-op City memberships were "securities." In addition, it held that, by participating in the cooperative development, the State and Agency had waived immunity from suit in federal court.

The Factual Background

Co-op City was conceived in 1964. Government officials, including the Governor of New York and the Mayor of New York City, working with UHF, determined that a large tract of vacant land in the Bronx was ideally suited for a low and middle income cooperative apartment development under the Housing Law. UHF was selected to sponsor the project (71a).

5. An additional federal claim was asserted under the Civil Rights Act, 42 U.S.C. §§1983, 1988, and 28 U.S.C. §§1331, 1343, solely against the Agency.

6. Accordingly, the District Court did not reach the additional issues raised by the State and Agency.

In accordance with the Housing Law, the State Division of Housing and Community Renewal and its Commissioner exercised continuing supervision over the planning and construction of the development (71-73a). All plans, projections, budgets, financial needs and other matters were submitted to the Division for review (*Id.*). The Division's Bureau of Finance and Audit reviewed financial computations. The Bureau of Construction reviewed and approved construction estimates. The Commissioner or his deputy approved the 1965 construction contract and all subsequent modifications (212a, 219a, 223a, 226a, 233a, 242a). Insurance matters, maintenance and operating schedules and legal matters were all sent to appropriate bureaus within the Division, and the Commissioner or his deputy approved agreements concerning them (72-73a, 321a, 324a, 327a, 332a, 336a, 339a).

Thus, the Commissioner determined and continues to determine the propriety of practically every dollar expended, as well as the initial and all subsequent carrying charge levels (73a). Such strict supervision and control by the State is mandated by law. Indeed, as the District Court found, beginning with the initiation of a project and continuing thereafter, "state control is pervasive" (P-B7).

Preliminary planning for Co-op City took more than a year. In July 1965, after the State had reviewed all plans and issued necessary approvals, the newly-formed Riverbay Corporation obtained mortgage funds from the Agency and began construction (73a).[7]

7. Under the financing plan adopted by the State and the Agency, 92.2% of the cost of construction of Co-op City was provided by the Agency through long term, low interest mortgage loans. The remaining 7.8% came from funds contributed by those purchasing Co-op City cooperative shares (347a, Sched. B).

Co-op City took seven years to build. It consists of over 15,000 apartment units in townhouses and 35 high-rise apartment buildings, spread over two hundred acres. It has stores, garages, schools, public auditoriums, parks and playgrounds and places of worship. It is, in effect, a new city, today housing approximately 50,000 people on a site which, just ten years ago, was an abandoned amusement park.

During the long construction period, the cost of building this new city increased substantially over original estimates. Because of the increases in construction costs, development costs, operating expenses, interest rates and taxes (76a), the average "per room" monthly carrying charge increased from $23.02 estimated in the 1965 Information Bulletin furnished to prospective members (174a), to an estimated $25.00 per room in the 1967 Information Bulletin (194a). No one had moved into Co-op City at this time (77a). The carrying charge figure increased again in 1970 and in two additional stages in 1973 and 1974 to the present average monthly charge of $40 per room (77a, P-B11). All increases in construction costs, in other costs and in carrying charges were fully reviewed and approved by the Commissioner as required by law (362a).[8]

Subscribers for Co-op City shares were advised of the increases in costs and carrying charges (*e.g.*, 101-03a). Those who wished to withdraw were permitted to do so,

8. The District Court found that, despite the significant increases in the construction costs, Co-op City apartments remain outstanding bargains, in great part because of their low unit cost of $19,000 compared with the $40,000 per unit average for other Housing Law projects built during the same period (P-B11 n.27).

and received a refund of their purchase price (393a). Indeed, every member who has withdrawn from the cooperative during its ten year history has received a full refund.[9]

The respondents claim, in essence, that they were not adequately advised of the possibility of increases in construction costs and carrying charges.[10] They seek to justify federal jurisdiction for their claims on the theory that the Co-op City memberships they hold are "securities."

The Co-op City Memberships

As the first step in securing an apartment in Co-op City, a prospective member completes a "Subscription Agreement and Apartment Application" (104-07a). The Agreement provides for the issuance of a number of shares proportionate to the number of rooms in the apartment requested, and it contains an application for a non-proprietary Occupancy Agreement (105a). The completed Agreement, with the required financial information, is submitted to the State for approval (84a; *cf.* 112a). All members must meet the income eligibility requirements of the Housing Law §31(2)(a), (b).

Following State approval of his application, and when an apartment becomes available, the prospective member enters into an Occupancy Agreement with the cooperative (85a). In form, the Occupancy Agreement is an apartment

9. In fact, since the decision of the Court of Appeals, the first-named respondents, Milton and Ellen Forman, moved from Co-op City and received a full refund of the purchase price of their shares. (Other named respondents still reside in Co-op City.)

10. Both courts below expressly disclaimed any inference as to the merits of the case (P-A3, 19 n.11, 22; P-B12 n.28).

lease and sets forth the monthly carrying charges and the rights, duties and obligations of the parties (108-19a). Unlike an ordinary lease, however, the Occupancy Agreement provides that, upon its termination, or if the member vacates the apartment for any reason, the member must first offer his shares to the cooperative or its designee on the terms set forth in the cooperative's by-laws (117a). Thus, ownership of Co-op City shares is entirely dependent upon occupancy of a Co-op City apartment. Further, there is no right to sublet (111a).

Co-op City's by-laws provide that a departing member must first offer his shares to the cooperative or its designee for "par value," which is the purchase price paid by the member (87a). Even if the cooperative should refuse to buy, however, the tenant is barred from realizing any profit because, under Housing Law §31-a, he cannot receive more for the stock than his purchase price plus a fraction of his allocable share of the mortgage amortization. Thus, as both courts below found, there is no possibility of profit on resale (P-A6, 16; P-B8-9, 19).

The by-laws restrict sale, alienation or encumbrance of a member's shares (131-32a, 135-36a). They also provide that each member shall have a single vote (123a). The number of shares held thus has no bearing upon voting rights. Moreover, the member's monthly carrying charges are unrelated to the shares held. Those charges, set forth in each Occupancy Agreement, are based on apartment size, type, location, height and other amenities (89a).

Thus, although Co-op City's cooperative members subscribe to instruments formally denominated "stock," the

instruments bear little similarity to conventional stock and other forms of securities found in the investment and business communities.

1. Cooperative members purchase their "stock" (at the rate of $450 per room) solely in order to enjoy the right to occupy a Co-op City apartment. All of their rights and obligations as tenants are set forth in an Occupancy Agreement entered into at the time of purchase. The acquisition of "stock," which does not provide the possibility of dividends or appreciation in value, is incidental. It is merely evidence of membership in the cooperative. It has no independent significance or meaning.

2. Cooperative members can sell their "stock" only when they vacate their apartments and only for the price they have paid.

3. All those who have asked to withdraw from the cooperative, before or after occupancy of their apartments, have been able to do so and have received full refunds of their purchase price.

4. The cooperative members are the beneficiaries of substantial State and City subsidies designed to enable low and middle income State residents to own their own homes. These subsidies are in the form of long term, low interest mortgage loans from the Agency covering 92.2% of the project cost and a real estate tax abatement from New York City which reduces the annual taxes by approximately 80%.

5. Initial and continued eligibility for cooperative membership is limited by law to low and middle income persons,

and members are required to submit annual income statements to the cooperative (112a). The prospective cooperative members are fully advised that the cooperative will not earn any profits nor pay them any income. They are not induced to purchase by any promise of, nor can they expect any, profit, gain or other financial reward.

6. Phrases commonly used in promoting sales of securities or other investments are conspicuously absent from the Information Bulletins and other documents furnished to prospective members.[11]

The Decisions Below

The District Court held that there was no subject matter jurisdiction because Co-op City memberships were not securities within the meaning of the securities laws, and it dismissed the complaint.

Rejecting a literal approach to the definition of "security" and heeding the admonitions of this Court to disregard form for substance, the District Court looked instead to the economic reality of the transactions at issue. The

11. In their place are descriptions such as the following:

"The purpose of a cooperative is to provide home ownership, not just apartments to rent. The community is designed to provide a favorable environment for family and community living. If you have lived in a private apartment house you were the tenant and someone else the landlord. The landlord's interest was in financial gain. There was no common interest between the tenants. You may have lived in the same apartment for years without getting to know your neighbors.

"The common bond of collective ownership which you share makes living in a cooperative different. It is a community of neighbors. Home ownership, common interests and the community atmosphere make living in a cooperative like living in a small town" (166a).

It should also be noted that the Information Bulletins were reviewed and approved by the Commissioner.

essential characteristics of Co-op City cooperative shares, it found, set them apart from conventional stock. That same economic reality, particularly the fundamental non-profit nature of transactions in Co-op City shares, buttressed the Court's conclusion that the shares were not investment contracts:

> "[N]one of the documents involved in this transaction . . . ever, once use material, tangible profits as an inducement . . . . [I]t is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce. These shares are incapable—by law and by-law—of producing any monetary or fungible return." (P-B21-22; footnotes omitted)

In response to respondents' arguments that the cooperative members' expectations of below market housing costs furnished the "profit" motive necessary to bring the transactions within the scope of the securities laws, the District Court stated:

> "[I]t seems certain that Congress never intended to stretch the scope of the securities acts outside the commercial world and its fungible valuables, to the uncharted and unchartable realm of intangible, elusive personal values where one man's balm may very well be another's bane." (P-B26)
>
> • • •
>
> "Congress did not intend to sweep into the ambit of the federal securities laws, state-encouraged, nonprofit transactions made pursuant to a state emergency housing law and available only to state residents." (P-B28)

The Court of Appeals reversed. Expressly adopting a "literal approach," it construed the definitional sections of

the statutes to mean that any instrument labeled "stock" is, without more, covered by the securities laws.

> "[T]he fact that 'stock' certificates are used in a 'stock' corporation is sufficient in itself to bring transactions in the 'stock' within the literal definition of the Acts." (P-A11)

The Court of Appeals alternatively held that Co-op City shares were also investment contracts and thus securities under the securities laws. It recognized that expectation or inducement of profit is an essential element of an investment contract and conceded that "there is no possible profit on a resale of the stock" (P-A16). Nevertheless, the Court found "profit" flowing from the ownership of Co-op City shares because (a) income from leased commercial space might reduce cooperative members' monthly carrying charges; (b) personal income tax deductions of mortgage interest payments and real estate taxes might be taken by cooperative members; and (c) Co-op City housing costs substantially less than equivalent housing in the open market and thus results in a saving of an expense to the cooperative members (P-A16-17).[12]

Summary of Argument

An eligible purchaser can buy shares in Co-op City for only one purpose—to obtain an apartment for use as a fulltime personal residence for himself and his family. He does not purchase in the hope of earning an annual income or return since he knows he is required to occupy the apartment and cannot sublet it. He does not purchase

12. In addition, the Court of Appeals found that the State and the Agency had waived their immunity from suit in federal court.

for capital appreciation because he cannot sell the shares for more than he paid. Such a purchase of a personal residence, which cannot be sold at a profit, is clearly not the purchase of a security subject to federal statutes enacted to regulate securities markets and business practices in the world of commerce.

The Court of Appeals' rigid adherence to a literal statutory construction is contrary to congressional intent, the decisions of this Court and the decisions of other Courts of Appeals. The securities laws were not intended to be applied woodenly, without regard to commercial context or economic reality. Their literal application here has resulted in the anomalous extension of the securities laws to transactions remote from the world of commerce, investment and speculation.

The Court of Appeals' alternative holding that Co-op City cooperative shares are investment contracts flies in the face of decisions of this Court defining investment contracts. By defining profit so broadly as to include the benefits of a public welfare program, the Court below effectively eliminated the essential element of profit from the definition of an investment contract.

The Court of Appeals' decision that Co-op City's nonprofit shares are investment contracts also conflicts with guidelines recently issued by the Securities and Exchange Commission. The guidelines state that group-owned housing units are not securities where, as here, the purchase is for personal residential use but will be considered securities only where there is an inducement of profit as that term is ordinarily used in commerce—"an opportunity

through which the purchaser may earn a return on his investment."

Finally, the blanket application of the securities laws to transactions in state subsidized low and middle income housing cooperative residences intrudes federal law into an area of great state concern without congressional sanction. Particularly where, as here, an innovative and important state housing program is involved, this Court should require a clear congressional mandate. Not only has Congress not issued such a mandate, but its recent enactments with respect to cooperative housing are totally inconsistent with application of the securities laws. Congress has recently directed the Department of Housing and Urban Development ("HUD"), not the SEC, to study whether federal regulation of abuses in cooperative and condominium housing sales is required. That legislative decision should be respected.

ARGUMENT

I

The Literal Approach to the Definition of a Security Is Contrary to Congressional Intent and Judicial Decision.

The Court of Appeals held Co-op City's cooperative shares to be "securities" because they are called "stock." Adopting a "literal approach" to the definition of security in the securities laws, it held:

> "[T]he fact that stock certificates are used in a 'stock' corporation is sufficient in itself to bring transactions

in the 'stock' within the literal definition of the Acts" (P-A11).[13]

The Court of Appeals' wooden application of the statutory language is inconsistent with the statutes' intent and purpose, conflicts with this Court's decisions and with the decisions of other Circuits and will produce illogical and arbitrary results.

A. Congressional intent requires that commercial context be considered.

Section 3(a)(10) of the 1934 Act, 15 U.S.C. §78c(a)(10), provides:

> "(a) When used in this chapter, *unless the context otherwise requires*—
>
> * * *
>
> (10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity

13. The Second Circuit subsequently extended its holding here to a private, luxury cooperative. 1050 Tenants Corp. v. Jakobson, 503 F.2d 1375 (2d Cir. 1974). In so doing, the Court noted, "First, we ground our decision on what has been characterized as the 'literal approach'." *Id.* at 1378.

> at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." (emphasis added)[14]

The introductory phrase "unless the context otherwise requires" mandates against a strict literal approach and requires that a court consider whether a suggested construction is consistent with the purpose of the statutes.

The legislative history of the securities laws demonstrates that substance rather than form should control. The laws were enacted in order to govern conduct in the commercial marketplace and to curb the unhealthy and predatory financial practices which helped precipitate the Depression. The thousands of pages of committee reports, hearings and debates focused on the stock market manipulations, margin abuses, and reckless stock market gambling of small investors who were lured on by the market-makers' siren song of "[a]lluring promises of easy wealth," and who were inevitably "sheared like lambs" by unethical financiers.[15] To reach these abusive schemes, Congress purposely defined the term "security" in

> "sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security." H.R. Rep. No. 85, 73d Cong.,

14. The 1933 Act's definition, §2(1), 15 U.S.C. §77b(1), is "virtually identical." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

15. H.R. Rep. No. 85, 73d Cong., 1st Sess. 2-3 (1933); 78 Cong. Rec. 7717 (1934). *See* 1934 Act, §2; S. Rep. No. 792, 73d Cong., 2d Sess. 1-4 (1934); 77 Cong. Rec. 2916-19 (1934) (Rep. Rayburn); 78 Cong. Rec. 2270-71 (1934) (Sen. Fletcher); *and, e.g.*, 78 Cong. Rec. 7689-90 (Rep. Sabath); 78 Cong. Rec. 7921, 8163-64, 8175, 8387 (1934).

1st Sess. 11 (1933); *cf.* S. Rep. No. 792, 73d Cong., 2d Sess. 5 (1934)

But Congress also indicated that it did not intend to extend federal regulation to those instruments "not regarded in the commercial world as securities offered to the public for investment purposes." H.R. Rep. No. 85, *supra*, at 15.[16] Co-op City's nonprofit memberships, which are not ever available to the commercial world, are certainly not "offered to the public for investment purposes."

B. Judicial decisions adopt a pragmatic, not a literal, approach.

Consistent with the legislative purpose, this Court has recognized that a security cannot be defined in a vacuum. The substance of an instrument and its commercial character must be considered. In *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967) this Court stated:

> "[I]n searching for the meaning and scope of the word 'security' . . ., form should be disregarded for substance and the emphasis should be on economic reality." *Id.* at 336 (citation omitted)

The Court in *Tcherepnin* unanimously held that withdrawable capital shares of an Illinois savings and loan association were securities under the 1934 Act. The shares entitled their holders to dividends based on an apportionment of the association's profits: this made the shares investment contracts. The Court alternatively held that the

16. Insurance policies were thus explicitly exempted on the grounds that they, and "like contracts," are not ordinarily regarded as investment securities. The House Committee thought that the exclusion could be implied from the "entire tenor of the act," but the specific exclusion was made "to make misinterpretation impossible." *Id.* at 15. *See also*, Collins v. Baylor, 302 F.Supp. 408 (N.D. Ill. 1969).

right to an apportionment of profits made the instruments "stock," although they were not labeled "stock." *Id.* at 338-39. Thus, the Court considered the rights the instrument created and ignored the label.[17]

In *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973), this Court used a pragmatic approach to exclude a transaction from the coverage of §16(b) of the 1934 Act, even though the transaction was literally a short-swing "sale" within the 1934 Act's definition of "sale," §3(a)(14). The Court stated:

> "The statutory definitions of 'purchase' and 'sale' are broad and, at least arguably, reach many transactions not ordinarily deemed a sale or purchase. In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to insider information—thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits." *Id.* at 593-95 (footnotes omitted)

17. Indeed, this Court has long spoken out against the literal application of statutory language. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"); CAB v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961) ("[Literalism] 'has all the tenacity of original sin and must constantly be guarded against'"). In Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945), Judge Learned Hand wisely remarked that it is an error "to make a fortress of the dictionary." *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

Thus the Court held that the transactions in *Kern* were not "sales" as defined in the statute because they did not offer the potential for insider trading and speculative abuse which §16(b) was intended to prevent.

The Court of Appeals' error in holding that all "stocks" are automatically securities under federal law is highlighted by the contrary approaches recently adopted by the Third, Fifth and Seventh Circuits. In *Lino* v. *City Investing Co.*, 487 F.2d 689 (3d Cir. 1973), the Third Circuit held the "note" in issue not a security, although the statute literally makes "any note" a security. In rejecting a literal construction, the Court stated:

> "[I]t is our view that the legislation was not intended to cover the transaction which occurred here. All of the definitional sections involved in this case are introduced by the phrase '*unless the context otherwise requires.*' The commercial context of this case requires a holding that the transaction did not involve a 'purchase' of securities." *Id.* at 694 (emphasis in original)

In *McClure* v. *First National City Bank of Lubbock*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, —— U.S. —— (1975), the Fifth Circuit rejected a literal approach and held that a commercial promissory note not made for investment purposes was not a security within the meaning of the 1934 Act.

And in *C.N.S. Enterprises, Inc.* v. *G. & G. Enterprises, Inc.*, CCH FED. SEC. L. REP. ¶94,938 (7th Cir. Jan. 13, 1975), the Seventh Circuit refused to follow a literal construction of "any note," and held that an ordinary commercial loan

transaction in which a note was given was not a securities transaction.[18]

* * *

Under the "literal approach," the name given an instrument, without more, determines whether transactions in it are covered by the securities laws. But housing cooperative "stock" is also called a "membership," and condominiums use deeds. The form of organization is dictated by tax laws, zoning, state and local regulation and custom—considerations unrelated to the securities laws. With respect to group-owned housing units, reliance on the literal words of the statutes to impose securities law jurisdiction leads to inconsistent and illogical results.[19] Thus Co-op City, whose memberships are called "stock", has been held subject to federal jurisdiction, while similar housing developments under private ownership and control can exempt themselves merely by choosing another form and label.

---

18. *See also* Bellah v. First Nat'l Bank of Hereford, 495 F.2d 1109 (5th Cir. 1974); Vincent v. Moench, 473 F.2d 430 (10th Cir. 1973); Thorp Commercial Corp. v. Northgate Industries, Inc., CCH FED. SEC. L. REP. ¶94,929 at 97,213 (D. Minn. Dec. 4, 1974) ("The Federal securities laws are not intended to protect banks and finance companies from fraud by a borrower in an ordinary commercial loan transaction. These institutions must turn to State law for relief").

19. In New York, the cooperative form prevailed for many years, but recent state legislation authorizing condominiums has resulted in a number of condominium developments. Thus, in New York City, one apartment building may be a cooperative while an otherwise identical neighboring building is a condominium. One new building in New York City is part cooperative and part condominium. Adopting a "literal approach" would lead to the absurd result that the documents evidencing ownership of an apartment on one floor of this building would be a "security" while analogous documents evidencing ownership of the same apartment on another floor would not. *See* Innovations Modifying Apartment Design, N. Y. Times, Feb. 23, 1975, sec. 8, p. 10, col. 2; *see also* note 31, *infra*.

Professor Loss, thus, rejects the literal approach as it applies to residential cooperatives, stating:

> "[S]ubstance governs rather than form: . . . just as some things which look like real estate are securities, some things which look like securities are real estate." 1 Loss, Securities Regulation 493 (1961) (footnote omitted)

II

Co-op City Memberships Are Not Investment Contracts.

The pragmatic approach to the definition of a security requires the court to examine the character of the instrument at issue and the economic context in which it is used. This examination, as both courts below agreed, is in essence the application of the investment contract test.

This Court first defined the investment contract concept more than thirty years ago in *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943):

> "The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect."

Three years later, in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 301 (1946), the Court refined its definition:

> "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[20]

20. Tcherepnin v. Knight, 389 U.S. at 338, reaffirms *Joiner* and *Howey* and applies them to the 1934 Act.

Joiner and *Howey* together established two related avenues of inquiry to determine whether an instrument is an investment contract—the economic inducement offered by the promoter and the purchaser's expectation of profits from efforts of others. While acknowledging the validity of these tests, the Court of Appeals misapplied them.

A. There was no inducement of profit.

The promise of monetary profit on one's investment—the inducement of substantial financial return—is a central and indispensable element of every investment contract. In *Joiner*, this Court said:

> "Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. *Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been quite a different proposition.*" 320 U.S. at 348 (emphasis added)

In *Howey*, the promoters had represented that profits from the investment could be 20% or greater. 328 U.S. at 296. *Cf. SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967).[21]

21. The circuit courts, other than in the decision below, in finding the investment contract test satisfied, have uniformly found that promoters held out the prospect of substantial financial gain. *See, e.g.*, SEC v. Haffenden-Rimar International, Inc., 496 F.2d 1192 (4th Cir. 1974), *aff'g* 362 F. Supp. 323 (E.D. Va. 1973) (seller predicted 20-25% annual return, doubling investment in four years); Nor-Tex Agencies, Inc. v. Jones, 482 F.2d 1093 (5th Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 475 (5th Cir. 1974) ("Koscot thrives by enticing prospective investors to participate in its enterprise, holding out as a lure the expectation of galactic profits"); Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027, 1034 (2d Cir. 1974) (the promoters

(footnote continued on next page)

It is unquestioned that the sale of Co-op City shares was not accompanied by such profit inducement. The Co-op City Information Bulletins contain no representations with respect to potential profit or income. Indeed, the District Court concluded—and this finding was undisturbed by the Court of Appeals—

> "that none of the documents involved in this transaction . . . ever, once use material, tangible profits as an inducement. In fact, the Information Bulletins assert the contrary, impressing upon the potential purchaser the stability of environment to be achieved because the shares cannot be used for speculation." (P-B21-22; footnote omitted)

In short, the Co-op City Information Bulletins do not promise "galactic profits" or offer the opportunity to engage in speculation or make a return on an investment. Instead the Bulletins stress the virtue of an apartment in a stable community and a membership in "a nonprofit enterprise owned and controlled democratically by its members" (162a). The inducement of the Co-op City offering is not profit, but housing; not a return on an investment contract, but an apartment to live in.

"virtually guaranteed" investors that they would "'double their money' in four years"); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 479, 842 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973) (Turner was selling a "sure route to great riches," a "get-rich-quick scheme"); Continental Marketing Corp. v. SEC, 387 F.2d 466, 470 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (promise of "geometric profits").

The SEC has also repeatedly stressed the importance of the economic inducements offered by the promoter, *e.g.*, *Offers and Sales of Condominiums or Units in a Real Estate Development*, SEC Securities Act Release No. 5347 (Jan. 4, 1973) (P-D9); [*Multi-level Distributorships and Pyramid Sales Plans*], SEC Securities Act Release No. 5211 (Nov. 30, 1971), 1 CCH FED. SEC. L. REP. ¶1048.

B. There is no expectation of profit.

An investment contract requires not only the offeror's inducement of economic gain but also the offeree's expectation of profit. *SEC* v. *W. J. Howey Co., supra.*

Both courts below agreed that purchasers of Co-op City memberships do not expect the kind of profit ordinarily associated with a security—appreciation in market value and receipt of dividends. Both courts found that, under the cooperative's by-laws and the Housing Law, there is no possibility of profit from the resale of shares in Co-op City (P-A16, P-B22; Housing Law §31-a).[22] As stated by the District Court:

> "It is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce. These shares are incapable—by law and by-law—of producing any monetary or fungible return." *Id.*

In reversing, the Court of Appeals did not find that these cooperative shares could generate profit as that word is ordinarily used in commerce. Nor did it find any inducement, promise or expectation of profit, as previously defined by the federal courts. Instead, the Court found "an expectation of 'income'" from three sources: (1) reduced carrying charges resulting from the rental of commercial facilities in the common areas of the project; (2) tax deductions allowed cooperators for interest and real

---

22. *Cf.* Stoneridge Golf and Country Club, SEC No-Action Letter, Jan. 3, 1975 (avail. Feb. 2, 1975), *noted in* BNA SEC. REG. L. REP. No. 289 (Feb. 12, 1975) at C-1-2. The determinative factor in the issuance of a no-action letter exempting the sale of golf club memberships from registration was the inclusion in the club's by-laws of a provision prohibiting the resale of the memberships at a price higher than the initial purchase price.

estate taxes; and (3) "the saving of an expense which would otherwise necessarily be incurred" (P-A16-17). This unprecedented expansion of the concept of a profit cannot be sustained.

1. *Rents from commercial facilities are not profit*—Co-op City was built on 200 acres of undeveloped land in the Bronx (169a). To provide for the residents' basic needs, the development includes parking garages, laundry facilities and community service centers which contain retail shops such as grocery stores and pharmacies, professional offices, community facilities, and schools, all patronized and used by the tenants. Tenants pay for parking privileges and for use of laundry machines, and the commercial establishments pay rent. Although the record is silent as to the income earned from these services (as this point was first raised by respondents in the Court of Appeals), the Court below nonetheless concluded that residents of Co-op City "may share . . . in substantial income, not in the form of dividend checks but in reduced monthly carrying charges" (P-A16).[23]

Even accepting the Court's unsupported finding that the rental of commercial facilities generates income to the cooperative, this income is not an "expectation of profit" as used in *Howey*. It is undisputed that these commercial facilities are incidental to the project and are included as

23. The Court of Appeals referred to exhibits submitted by respondents in the District Court (351a, Sched. B; 353a, Sched. B). The exhibits contain, among other things, estimates of gross commercial rentals. The Court of Appeals misread the exhibits as stating net rental. Petitioners contend that a full examination of the facts will demonstrate that these facilities do not generate any significant net income.

a necessary service to the residents.[24] The service areas are not—and were never intended to be—a primary source of income; indeed, in describing these facilities, the Information Bulletins do not mention any possibility of income to the cooperative (169a, 190a).

The SEC has rejected the Court of Appeal's view that such income from incidental commercial facilities is profit. In Securities Act Release No. 5347 (Jan. 4, 1973) (P-D5) ("SEC Release No. 33-5347"), the Commission stated, in pertinent part:

> "In situations where commercial facilities are a part of the common elements of a residential project, no registration would be required under the investment contract theory where (a) the income from such facilities is used only to offset common area expenses and (b) the operation of such facilities is incidental to the project as a whole and are not established as a primary income source for the individual owners of a condominium or cooperative unit." (P-D11)

Co-op City's commercial service facilities clearly fall within the SEC guideline.

The SEC release recognizes that the prospect of reduced carrying charges because of income from incidental commercial facility rentals is not the kind of profit that would induce the ordinary investor for whose protection the securities laws were passed to place his money in a residential cooperative. No investor seeking a profit would purchase memberships in Co-op City because of these com-

24. Indeed, under the Housing Law, the construction of commercial facilities in a cooperative project is limited to those which are "incidental and appurtenant" to the project. Housing Law §12(5). Under §216 of the Internal Revenue Code, income from these facilities cannot exceed 20% of the cooperative's gross income. 26 U.S.C. §216 (b)(1)(d).

mercial facilities. Yet no tenant seeking a place to live would move in without them. The commercial facilities make Co-op City a viable and attractive housing opportunity but do not turn it into a profit-making investment of the kind included within the ambit of the securities laws.

2. *Tax deductions are not profit*—The Court of Appeals held that the ordinary homeowner's tax deductions for real estate taxes and mortgage interest are items of profit to Co-op City members (P-A17).

The potential tax deduction, which is neither emphasized in the Information Bulletins nor guaranteed by the sponsor (175a, 195a), "is an incident of real estate ownership, not securities ownership" (P-B22 n.35). Section 216 of the Internal Revenue Code, 26 U.S.C. §216, permits tenants in a cooperative housing corporation to deduct from their personal income tax their proportionate share of the cooperative's mortgage and tax payments. The clear legislative purpose of this section is to place tenants in a cooperative apartment "in the same position as the owner of a dwelling house so far as deductions for interest and taxes are concerned." S. Rep. No. 1631, 77th Cong., 2d Sess. 51 (1942). *See Park Place, Inc.*, 57 T.C. 767, 776 (1972). A shareholder of Co-op City thus can claim a tax deduction because he is homeowner and not because he owns a security.

SEC Release No. 33-5347 does not recognize such ordinary tax deductions as profit which will transform housing into securities. Moreover, the size of the tax saving, if any, a resident of Co-op City derives from Section 216 depends upon his own income level and whether he itemizes

deductions. The deduction is unique to each individual cooperator. It is neither created nor affected by the efforts of others and thus, even if considered an element of profit, does not derive "solely from the efforts of others."

3. *"Saving of an expense" is not profit*—Finally, the Court of Appeals held that the opportunity to obtain housing at or below market cost is profit within the meaning of *Howey* (P-A17-18). This definition of profit, which is unprecedented in federal securities cases, confuses "benefit" with "profit."[25] As the District Court stated:

> "[I]t seems certain that Congress never intended to stretch the scope of the securities acts outside the commercial world and its fungible valuables, to the uncharted and unchartable realm of intangible, elusive personal values-where one man's balm may very well be another's bane." (P-B26; *see also* P-B27 n.43)

The "saving of an expense" depends in part on highly subjective personal preferences rather than objectively demonstrable financial gain. Thus, in determining whether the members of Co-op City were induced to become residents by an expectation of savings, the Court will have to consider, for example, such factors as the costs of commuting to work, the relative desirability of living in this community as opposed to others in the New York metropolitan area, the attractiveness of the project and a host of other equally subjective factors. This savings is often incapable of measurement and is completely inconsistent with profit in the ordinary financial sense.

---

25. *See* Miller, *Cooperative Apartments: Real Estate or Securities?*, 45 Boston U. L. Rev. 465, 496, 504 (1965). In 1050 Tenants Corp. v. Jakobson, *supra*, which involved luxury apartments sold at prevailing market rates, the Court of Appeals below stretched this tenuous concept of "profit" to include "optimum services at minimum cost." What is not a "profit" under this test?

In so stretching the concept of profit, the Court of Appeals ignored the essential distinction between purchase for personal use and purchase for financial gain. The recent decisions and administrative rulings in the whiskey warehouse receipt cases illustrate this distinction. The SEC and the courts have consistently recognized that not all purchases of whiskey receipts which result in savings to the purchasers are investment contracts. Instead, the courts and the SEC have examined the purpose of the transaction and distinguished between purchases for personal use (even when bought as a hedge against inflation or to take advantage of a good bargain) and purchases which are part of a money-making scheme contemplating ultimate resale.[26] SEC Release No. 33-5347 implicitly recognizes this distinction as well.

This distinction is fundamental to the proper enforcement of the securities laws. Without it—and if the holding below is allowed to stand—virtually every "common enterprise," every agreement by a group of people to pool their resources to save money, becomes an investment contract subject to federal regulation under the securities laws and to litigation in federal court.

26. *See, e.g.*, Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d at 1034 ("The evidence below shows that investors put up their money not so much to secure casks of Scotch whiskey but to participate in an enterprise which was virtually guaranteed to 'double their money' in four years"); SEC v. Haffenden-Rimar International, Inc., *supra*; SEC Securities Act Release No. 5018 (Nov. 4, 1969), 1 CCH FED. SEC. L. REP. ¶1047 at 2066.

C. Under SEC guidelines, Co-op City memberships are not investment contracts.

In holding Co-op City memberships to be securities, the Court of Appeals drew support from SEC Rule 235, but ignored recent SEC guidelines in the area of group-owned housing. Indeed, under current SEC guidelines, a Co-op City membership would not be a security.

The SEC's policy of not regulating cooperative residential housing, as opposed to real estate investments, is of long standing. At first the Commission took a formal approach and exempted most residential housing cooperatives from registration. Recently, the Commission adopted more sophisticated guidelines for determining when an offering of housing units involves securities.

The Commission's first pronouncement in this area was SEC Rule 235, 17 C.F.R. 230.235, effective January 9, 1961. As applied by the SEC, Rule 235 exempts from registration stock in virtually all cooperative housing corporations if the principal activity of the corporation is the "ownership, leasing, management or construction of residential properties for its members. . . ."[27] 17 C.F.R. 230.235(b). However, to argue that the existence of Rule 235 demonstrates conclusively that stock in a housing cooperative is

27. Rule 235 exempts cooperatives if the "aggregate offering price" of the stock is below $300,000. The SEC has interpreted this language to create the broadest possible exemption. It has permitted sellers of cooperatives of any size to obtain an exemption if the par value of the cooperative's stock is less than $300,000. *See, e.g.*, 900 Park Ave. Corp., SEC No-Action Letter, June 9, 1972 (avail. July 10, 1972) (exempting offering totalling $11,896,000); Summit House Tenants Corp., SEC No-Action Letter, Jan. 6, 1972 [1971-72 Transfer Binder], CCH FED. SEC. L. REP. ¶78,611 (exempting offering totalling $4,279,293).

a security is, in Professor Loss' words, "too facile." 1 Loss, Securities Regulation 493-94 (1961).[28] Indeed, according to the 1972 Report of the SEC Real Estate Advisory Committee ("Advisory Report"), appointed by Chairman Casey to undertake a comprehensive review of the applicability of the securities laws to real estate, Rule 235 was adopted "partly in recognition of the fiction of calling cooperative stock 'securities' . . . ."[29] By exempting the whole field, the Commission has avoided this "fiction" and maintained a hands-off policy regarding residential cooperatives.

The Advisory Report,[30] recognizing that the application of the Securities Laws to real estate transactions is too complex to be governed solely by labels, leaves no doubt that a membership in a residential cooperative like Co-op City is not a security within the meaning of the securities laws.

The Committee based its analysis on the principle that the coverage of the securities laws extends to offerings of investment contracts but not to offerings of dwelling units for personal use: "the dwelling unit, of itself, does not constitute a security without additional facts." Advisory Report at 90; *see SEC* v. *C. M. Joiner Leasing Corp.*, 320

28. It has been suggested that "[a] more plausible argument is that an exemptive rule was a convenient means for the Commission to avoid the cooperative housing regulation issue." Recent Development, 62 Georgetown L. J. 1515, 1527 n.62 (1974).

29. Report of the Real Estate Advisory Committee to the Securities and Exchange Comm'n (Oct. 12, 1972), 90 n. 26.

30. The Advisory Report and the SEC response are discussed in Dickey and K-Thorpe, *Federal Security Regulation of Condominium Offerings*, 19 N. Y. L. Forum 473 (1974). Mr. Dickey was the Chairman of the Advisory Committee.

U.S. at 348. Thus the Advisory Report concluded that an offering of shares in a residential cooperative or condominium[31] on a "user" rather than "investment" basis does not constitute an offering of securities. *Id.* at 76. Only if an offering involves a rental pool, where a third party undertakes to rent out dwelling units on behalf of some or all of the owners and to distribute the rental income on a pro rata basis, or a requirement that the owner make his unit available for rental for a portion of the year, or some other indication that the units are "being marketed and purchased primarily as an investment," *Id.* at 79, would the securities laws apply.

The Advisory Report explicitly rejected the Court of Appeals' argument that the mere presence of commercial facilities as part of a residential cooperative *per se* turns the offering into a security. *Id.* at 81. On the contrary, the Committee recognized that such commercial facilities are "not atypical" and are included for the benefit of the residents. Thus the Report concluded that if commercial facilities were incidental to a residential project and not the "main financial inducement for purchasing the unit," their existence did not make the offering a security. *Id.*

Finally, the Committee recommended that the SEC abandon the "anachronistic" and "admittedly arbitrary" exemption of Rule 235 and the "legal fiction" upon which

31. The Advisory Report stresses that the form of the transaction, whether cooperative or condominium, should be disregarded:

> "Cooperative dwelling units should be treated in substantially the same manner as condominium units inasmuch as the form of ownership is primarily a matter of local law and preference and represents no substantial difference with relation to the securities laws." *Id.* at 89; *see id.* at 89-91.

it was based, *id.* at 90, and adopt new rules or guidelines to determine

> "when the offering being made is of real estate for personal use and when the offering is of a security with the requisite need to provide the offeree with the protections afforded by the federal securities laws." *Id.* at 76.

Although it has not formally repealed Rule 235,[32] the SEC issued new guidelines embodying the recommendations of the Report. These guidelines, SEC Release No. 33-5347 (P-D5-11), state that an offer of a condominium or similar unit[33] is not a security unless it is promoted on a profit-making rather than personal use basis and is combined with collateral arrangements, such as a rental pool or a required rental period (P-D9-10). The Release also adopts the Committee recommendation that the presence of commercial facilities as an incidental part of a residential cooperative does not turn the project into a security.[34]

The release and the Advisory Report are in accord with the previously published views of the SEC staff. For ex-

32. The SEC staff recently announced that it is re-examining the Rule 235 exemption in light of the Court of Appeals' decision below. Society Hill Towers, Inc., SEC No-Action Letter, Dec. 27, 1974, CCH Fed. Sec. L. Rep. ¶80,103.

33. The release applies to cooperatives as well as condominiums. As the release states:

> "Although this release speaks in terms of condominiums, it applies to offerings of all types of units in real estate developments which have characteristics similar to those described herein" (P-D6-7).

The Release specifically mentions cooperatives (*see* p. 29, *supra*), and was adopted as a result of the Advisory Report which explicitly rejected distinctions between cooperatives and condominiums.

34. Similarly, under Rule 235, "incidental" commercial facilities do not affect exempt status. 17 C.F.R. 230.235(b).

ample, the staff issued a no-action letter in August 1971 to a developer of a Maryland residential condominium which contained apartment units and commercial facilities on the same site. The developer stated that the members of the condominium would also hold stock in the corporation that owned the commercial facilities (shops, restaurants, a swimming pool and an entertainment area), which, although open to the public, were primarily for the benefit of and as a convenience for the residents of the condominium. Income from the commercial area was to be used to offset common area expenses. The Commission staff concluded that the offering did not involve securities requiring registration even though the offering included instruments called "stock." Clemson Properties, Inc., SEC No-Action Letter, Aug. 13, 1971, [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,387. *See also* McCulloch Properties, Inc., SEC No-Action Letter, Aug. 30, 1973 (avail. Oct. 1, 1973).

Thus, under published SEC guidelines and no-action letters, a share in Co-op City is not a security. The purchasers are buying dwelling units for personal use, there are no rental pools or required rental periods, the commercial facilities are incidental to the project and not a primary source of income, and the promotional material does not emphasize the economic benefits to be gained from participation in the project.

The Court of Appeals ignored SEC Release No. 33-5347. But the silence of the Court below does not alter the soundness of the guidelines set forth in the Release. For the

purposes of the securities laws, purchases for residential purposes should be separated from investment transactions for profit.

III

This Court Should Not Extend Jurisdiction of the Securities Laws to State Regulated Housing Cooperatives Without a Clear Congressional Mandate.

The federal securities laws are remedial legislation warranting liberal construction to accomplish the statutory purpose. But their blanket application to state subsidized and regulated housing cooperatives intrudes upon an already complex and heavily regulated state statutory scheme without congressional authorization and, in fact, contrary to recent expressions of congressional intent.

A. Low and middle income housing is a matter of great state concern and pervasive state regulation.

Co-op City was built under a housing program adopted by New York State to remedy a severe shortage of "decent healthful housing," to forestall the deterioration of "slum ghetto" neighborhoods, and to improve "the quality of urban life." Housing Law §§11, 11-a(1), (2-a). The New York Legislature viewed this program as "play[ing] a big part in arresting the exodus of families from the cities" and inhibiting the spread of slums. *Note of Comm'n, reprinted at* Housing Law §10 at 9 (McKinney 1962). The Legislature encouraged the cooperative format because of important social benefits to the cooperators and their communities; it believed that cooperative homeownership by

low income tenants would revitalize the quality of urban life and that the "consequent pride and responsibility of ownership" would "lead to the stabilization and renewal of deteriorating neighborhoods." Housing Law §11-a(2-a).

Under the Housing Law, virtually every aspect of a cooperative's development and operation is regulated by the State (P-B6-7).[35] The Commissioner of Housing has broad investigatory powers with respect to supervision of a cooperative's affairs; he may remove and replace a project's directors if they have violated the law, state regulation or the certificate of incorporation. He may sue to prevent such violation—or any act or omission "which is improvident or prejudicial to the interest of . . . the tenants." Housing Law §32(5)-(7).

In addition, New York has a complex statutory scheme of registration and supervision of housing cooperative and condominium offerings. N.Y. Gen. Bus. Law §§352-e, 352-i. The State Attorney-General has wide powers to sanction and enjoin improper conduct, and the state law "anti-fraud" statutes are broad. *See People* v. *Cadplaz Sponsors, Inc.*, 69 Misc.2d 417, 330 N.Y.S. 2d 430 (Sup. Ct. N.Y. Co. 1972).

B. Federal statutes should not be extended to an area of great state concern without a clear congressional mandate.

This Court has long held that federal courts should not construe federal statutes so as to alter significantly the

35. *See* p. 8, *supra*.

federal-state balance—and federalize an area of state law —unless Congress has clearly expressed that purpose. This judicial policy reflects a determination not to interfere with local control and regulation of local problems without congressional direction, and a desire not to strain federal resources, particularly where the states and state courts are competent to act. The policy was clearly enunciated in *United States* v. *Bass*, 404 U.S. 336, 349 (1971):

> "In traditionally sentitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

In *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), the Court found that congressional silence as to the effects of legislation on the federal-state regulatory balance "strongly suggests" that Congress did not intend a result that would intrude on the states.

Even in the area of bankruptcy reorganization of railroads, a matter of predominantly federal rather than state concern, the Court has been unwilling to superimpose federal regulation over that of the states without "language fitting for so drastic a change." *Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939). Thus, Justice Frankfurter noted that although Congress had in other statutes exercised regulatory authority of a railroad's intrastate activities,

> "such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore,

> in construing legislation this court has disfavored inroads by implication and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress." *Id.* at 84 (footnotes and citations omitted)

See also Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 513 (1940).[36]

The Court of Appeals noted that many industries, such as public utilities, which are highly regulated by the states, are also subject to federal regulation and federal jurisdiction under the securities laws (P-A19). But federal regulation of public utilities—and the potential impact on state regulation—was considered by Congress, and a deliberate decision to impose federal regulation was made.[37] By contrast, the securities laws and their legislative histories are totally silent on the subject of housing cooperatives.

---

36. *Cf.* United States v. Wittek, 337 U.S. 346 (1949), in which this Court considered whether federal defense housing in the District of Columbia was covered by federal rent control, a remedial law which was literally applicable. The Court found that such a construction would also subject D.C. public housing to rent control. Given the importance of the public housing program and the inconsistency of the rent control law with public housing policy, it was inconceivable, the Court held, that Congress would have intended to subject the public housing program to control of another agency under an act designed to meet wholly different problems without having clearly said so. *Id.* at 357-58.

37. *See* S. Rep. No. 47, 73d Cong., 1st Sess. 4 (1934); *Hearings on H.R. 7852 and 8720 before House Interstate and Foreign Commerce Comm.*, 73d Cong. 507, 667-68 (1934); *Hearings on S. Res. 84 (72d Cong.) and S. Res. 56, 57*, 73d Cong., pt. 15, 7022, *cf.* 6577 (1934).

C. Federal housing legislation is inconsistent with securities law jurisdiction.

Far from issuing a "clear statement" or "plain mandate" that housing cooperatives are subject to the securities laws, Congress has indicated that housing cooperatives should be federally regulated, if at all, by housing laws administered by HUD.

The most direct congressional statement with respect to federal regulation of transactions in cooperative homes is contained in Section 821 of the Housing and Urban Development Act of 1974, 42 U.S.C. §3532. There, Congress directed HUD to conduct a study of the "problems, difficulties, and abuses or potential abuses applicable to condominium and cooperative housing" and to determine whether federal legislation is needed.[38]

The amendment proposing this study was offered on the floor of the House by Rep. Benjamin S. Rosenthal and was adopted without opposition. Congressman Rosenthal proposed the bill because fewer than ten states "have meaningful laws protecting condominium and cooperative purchasers." 120 Cong. Rec. 5371, 93d Cong. 2d Sess. (daily ed. June 20, 1974). The study, which would provide Congress with information to "deal with an issue of growing national concern," would focus on, among other things,

> "the legal and economic factors surrounding condominium and cooperative construction and conversion; . . . the social and housing-policy implications of condominiums and cooperatives, and . . . the alleged consumer problems associated with [their] sale . . . and conversions." *Id.* at 5372.

38. *See* N.Y.L.J., Jan. 15, 1975, p. 6, col. 6. HUD will report its findings and recommendations to Congress by August 22. The N.Y. Times reports that questions by HUD officials at recent hearings revealed concern about, among other things, federal involvement in real estate transactions in general and about the effect of federal regulation on housing costs. N.Y. Times, Feb. 13, 1975, p. 38, col. 1.

Significantly, Congress did not suggest that the way to prevent sales abuses in cooperatives or condominiums was to call on the SEC to act, or that the securities laws provide a solution. If those laws apply to housing cooperatives, Congress is unaware of it.

Another 1974 statute, the Real Estate Settlement Procedures Act of 1974, P.L. No. 93-533 (Dec. 22, 1974) ("RESPA"), requires substantial written disclosures in virtually all mortgage loan transactions in "residential real property," including private homes and "individual units of condominiums and cooperatives." RESPA §3. It requires, among other things, a standard form for settlement cost disclosure; a descriptive booklet explaining settlement procedures; and, in some cases, a disclosure of certain information about the sales history of the property, to prevent real estate speculation. RESPA §§4, 5, 6; H.R. Rep. No. 93-1177, 93d Cong., 2d Sess. 6, 9 (1974). Significantly, the Act has directed HUD, not the SEC, to issue regulations under the Act, to study the effects of the legislation for three to five years and to report back to Congress on the need for further legislation, if any. RESPA §§4-6, 14.

Congress' unwillingness to apply the securities laws to real estate transactions generally is evidenced by the history of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720. The early legislative proposals would have applied the 1933 Act to interstate land sales. Although the need for legislation was apparent, those bills were rejected as overly broad and an unnecessary infringe-

ment on traditional state power. As the Department of Commerce noted:

> "The bill would add considerably to the cost of homesites, and put a considerable burden on the Securities and Exchange Commission to administer such legislation effectively." S. Rep. No. 1123, 90th Cong., 2d Sess. 198 (1968) (*cited in* Combined Views of Senators Bennett *et al.*)

As finally enacted, the statute is drawn narrowly. Federal supervisory authority is vested in HUD. 15 USC §1715(a).

Congressional studies of housing problems demonstrate that Congress views cooperative housing as a vehicle for the accomplishment of important social goals. The language used by Congress in emphasizing and encouraging cooperatives is totally inconsistent with their treatment as securities in the commercial marketplace.

Twenty-five years ago, Congress recognized the unique social advantages offered by cooperative housing. Congress noted that the savings effected by the elimination of profit, together with other reductions in costs, make it possible to provide decent housing to lower income families. In reporting out amendments to the National Housing Act (the Housing Act of 1950), the Senate Committee on Banking and Currency, which has jurisdiction over both securities and housing, stated that,

> "[Title III] is designed . . . [so that] soundly conceived cooperative housing projects will be able to secure the low-cost financing essential to reduced monthly charges, and the benefits and savings thereby achieved are, in a cooperative . . . automatically translated into direct benefits to consumers in the form of

> reduced monthly charges. . . . [T]here can be no diversion into speculative profits of the financial economies made possible by the low-cost financing." S. Rep. No. 1286, 81st Cong., 2d Sess. (1950), *in* 1950 *U.S. Code Cong. Serv.* 2021, 2101.

These and other savings would, the Committee stated, "bring good housing within the reach of a substantial number of middle-income families who otherwise cannot obtain it." *Id.* at 2107. *See* S. Rep. No. 892, 81st Cong., 1st Sess. 6, 48-49 (1949). More recently, the National Commission on Urban Problems has viewed the cooperative as a viable solution for the housing shortage for low and lower middle income groups, having substantial advantages over traditional rental housing. *Building the American City, supra,* at 134, 139-42.[39] The housing cooperative produces "a greater sense of community and of belonging," greater racial and religious integration and "pride of ownership." The Commission reported that vandalism, crime and delinquency have been low even in former problem rental projects; and mortgage and maintenance records have been excellent. *Id.* at 141-42.

D. Congress is best suited to decide whether and in what manner housing cooperatives should be federally regulated.

The decision whether to subject transactions in cooperative homes, particularly state financed and regulated cooperatives, to federal law should be made by Congress, not the courts. Congress is the institution best equipped

---

39. The Commission, headed by Senator Paul H. Douglas, was created by Congress and the President to study and recommend ways "to increase the supply of low-cost decent housing," among other things. *Id.* at vii.

to resolve the many complex issues which arise when fashioning a balance between federal and state interests.

Congress, not the courts, is best equipped to determine the nature and scope of the substantive law, if any, needed to regulate cooperative housing.

Congress, not the courts, is best equipped to decide whether state regulation is to be entirely superseded, or whether such regulation is to control where it is sufficiently thorough.[40]

Congress, not the courts, is best equipped to decide whether the federal courts should be opened to litigation between developer and purchaser or between private seller and purchaser and if so, whether such jurisdiction should be exclusive or concurrent with state courts.[41]

40. *See, e.g.*, Section 123 of the Truth-in-Lending Act, 15 U.S.C. §1633, under which certain credit transactions can be exempted if, under applicable state laws, those transactions are "subject to requirements substantially similar to those under this part" and are adequately enforceable.

Moreover, the states' traditional interest in housing has been consistently recognized and reaffirmed by Congress in its housing legislation. *See, e.g.*, RESPA §§14(b)(3), 18, and S. Rep. No. 93-866, 93d Cong., 2d Sess. 5 (1974), which rejected direct federal regulation of settlement cost rates because it "would infringe on an area that has historically been of state or local concern" and would duplicate some existing state regulatory schemes; the Housing and Community Development Act of 1974, §§101, 201(a), 802(a), 42 U.S.C. §§5301, 1437, 1440(a); 42 U.S.C. §3532(b), which requires the Secretary of Housing and Urban Development to consult and cooperate with the states with respect to community development problems. The National Commission on Urban Problems found that "the States have tended to become forgotten members of the governmental family" and recommended decentralization of urban development programs. *Building the American City, supra* at 29-30.

41. *E.g.*, in RESPA §16, Congress provided that suits to recover damages under §§6, 8 or 9 may be brought in federal or state court

(footnote continued on next page)

Congress, not the courts, is best equipped to decide whether to require a jurisdictional amount and whether other securities law concepts such as national service of process, expansive venue, and invalidity of arbitration clauses are appropriate.[42]

Subject to constitutional limitations, Congress is best equipped to decide the extent to which state governments and agencies are to be subject to suit under the legislation it enacts.

There are other careful distinctions to be drawn and problems to be considered in any decision to proceed with federal regulation of the sales of housing cooperatives, particularly state subsidized and regulated cooperatives. Such matters are peculiarly legislative in nature and warrant congressional deliberation. As this Court has stated, pleas for the expansion of federal jurisdiction into "hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." *United Steel Workers of America* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 150-51 (1965). *See also Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941).

within one year of the violation. If the decision below is sustained, it is to be expected that homeowners with housing complaints who have even the slimmest chance of establishing a 10b-5 claim will sue in federal court and assert all of their other claims under the doctrine of pendent jurisdiction—a practice which was followed in this very case and which in earlier cases generated criticism from the courts. Ryan v. J. Walter Thompson Co., 453 F.2d 444, 445 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972); Kavitt v. A. L. Stamm & Co., 491 F.2d 1176, 1178-79 (2d Cir. 1974).

42. Under the decision below, the rule of Wilko v. Swann, 346 U.S. 427 (1953), will render unenforceable agreements to arbitrate disputes arising out of the purchase or sale of cooperative or condominium residences, thus adding to the prospective burden of federal litigation and further upsetting a traditional and encouraged manner of resolving such disputes.

Respondents ask this Court to impose by judicial decision, without express or implied congressional sanction, a complex and costly federal regulatory scheme upon a state regulated housing cooperative. Here, Congress has clearly indicated that such results were not intended. Congress has referred the question of federal regulation of housing cooperative sales to HUD for report and possible legislative action. This Court should respect that legislative decision and decline to intercede.

Conclusion

This case involves the purchase of cooperative homes under a state subsidized and regulated nonprofit housing program with respect to which profit incentives are totally absent. The Court below held that the documents reflecting the ownership of these homes are securities within the meaning of the securities laws and therefore entitle the purchasers to litigate their grievances in federal court.

That decision is contrary to the purpose and intent of the securities laws and the decisions of this Court and of other circuit courts. It is inconsistent with recent SEC guidelines and congressional action in the field of cooperative housing. It effects a sweeping expansion of the scope and coverage of the securities laws, undermines SEC guidelines, vastly expands the number of kinds of disputes which may be litigated in federal courts and extends securities law jurisdiction into an area of traditional state concern and regulation at the very time Congress is considering an entirely different approach to potential problems in housing cooperatives.

Perhaps most importantly, however, the Court below failed to recognize that the securities laws, though to be broadly construed to effect their remedial purpose, cannot and should not be utilized to solve problems with which they were not designed to deal. The securities laws were enacted to protect investors in the commercial marketplace, not consumers in the housing marketplace; they cover securities, not homes. The overly broad construction given by the Court of Appeals makes the securities laws, in effect, a general catch-all for all kinds of complaints and problems quite alien to the statutes' scope and original intendment.

The decision below should be reversed and the case dismissed for want of subject matter jurisdiction. Respondents should be required to air their housing grievances by pursuing the ample remedies available to them in the courts of the State of New York.

Dated: New York, New York
March 6, 1975

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
(212) 644-8602

Attorney for Petitioners
United Housing Foundation, Inc., et al.

MARTIN LONDON
GEORGE P. FELLEMAN
MARSHALL BEIL
CAROL GOODMAN
ALAN G. BLUMBERG
Of Counsel

APPENDIX

Statutes, Rule, and Release Involved

The statutes involved in this case are 15 U.S.C. §§77b(1), 77q, 77v(a), 78c(a)(10), 78j(b), and 78aa, which provide as follows, in pertinent part:

15 U.S.C. §77b [Sec. 2(1), 1933 Act]

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §77q [Sec. 17(a), 1933 Act]

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past of prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

15 U.S.C. §77v(a) [Sec. 22(a), 1933 Act]

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took

place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

15 U.S.C. §78c(a) (10) [Sec. 3(a)(10), 1934 Act]

(a) When used in this chapter, unless the context otherwise requires—

* * *

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. §78j (b) [Sec. 10(b), 1934 Act]

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. §78aa [Sec. 27, 1934 Act]

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant

may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

17 C.F.R. 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Supreme Court, U. S.
FILED
APR 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,

Petitioners,

—v.—

MILTON FORMAN, *et al.*,

Respondents,

—and—

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

—v.—

MILTON FORMAN, *et al.*,

Respondents.

RESPONDENTS' BRIEF

LOUIS NIZER
40 West 57th Street
New York, New York 10019
Attorney for Respondents

GEORGE BERGER
JAY F. GORDON
IRA B. ROSE
JANET P. KANE
THOMAS G. JACKSON
Of Counsel

INDEX

	PAGE
Questions Presented	1
Statement	2
The Parties, and the State's Proprietary Interest in Co-op City	4
The First "Information Bulletin" (Prospectus)	10
The Material Omissions	13
The Commissioner's Waiver of His Own Liquidity Rule	14
The Second "Information Bulletin" (Prospectus)	16
The Changes in the Construction Contract	17
1. The First Increase of $9,328,000	17
2. The Second Increase of $250,000	18
3. The Third Increase of $1,900,000	18
4. The Fourth Increase of $40,519,250	18
5. The Fifth Increase of $30,000,000	19
6. Increase of Service Fees by $2,510,000	20
Increases in the Mortgage	21
The Resulting Increases in Carrying Charges	21
The Securities Sold Pursuant to the Information Bulletins	22

PAGE

The True Purchase Price of Riverbay Stock Was Never Disclosed to Plaintiffs 23

The Economic Inducements Contained in the Information Bulletins 25

The Incidents of Ownership of Riverbay Stock 27

The "Profitability" of the Transaction From the Seller's Viewpoint 30

Summary of Argument 32

ARGUMENT:

POINT I

The common stock of Riverbay purchased by plaintiffs is a security within the meaning of the federal securities laws 33

A. The common stock of Riverbay is within the meaning of the term "stock" in the statutory definition of a security 33

1. The Statutory Language 34

2. The Case Law 35

3. The Legislative History 41

4. Rules and Regulations of the SEC 42

5. The State Blue Sky Statutes 46

6. The Legal Commentators 47

PAGE

B. Alternatively, the shares of common stock of Riverbay purchased by plaintiffs are "investment contracts" within the meaning of the federal securities laws 48

C. Alternatively, the shares of common stock of Riverbay purchased by plaintiffs are "instruments commonly known as a 'security'" within the meaning of the statutory definition 57

D. Congress has mandated application of the federal securities laws to interstate sales of stock regardless of state regulation 60

POINT II

The defense of immunity under the Eleventh Amendment is not available to the Agency and has been waived by the State 65

A. The Agency cannot assert the defense of Eleventh Amendment immunity 65

B. The defense of Eleventh Amendment immunity has been waived by the State both by statute and by conduct 67

1. The defense has been waived by statute 67

2. The defense has been waived by conduct 70

CONCLUSION 79

Table of Authorities

PAGE

Cases:

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) 34
Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 35, 39, 41-42
Ahrens v. American-Canadian Beaver Co., 458 F.2d 607 (10th Cir. 1970) 51
Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E. 2d 812 (1957) 29
Ashton v. Thorton Realty Co., 346 F. Supp. 1294 (S.D. N.Y. 1972), *aff'd*, 471 F.2d 647 (2d Cir. 1973) 41

Baron v. Shields, 131 F. Supp. 370 (S.D.N.Y. 1955) 73, 78
Bellah v. First National Bank, 495 F.2d 1109 (5th Cir. 1974) 40
Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953), *cert. denied*, 347 U.S. 925 (1954) 50
Bond v. Koscot Interplanetary, Inc., 276 So. 2d 198 (Fla. App. 1973) 56
Braun v. State, 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952) 66
Browder v. United States, 321 U.S. 335 (1941) 34

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1970) 43
Charles Simkin & Sons, Inc. v. State University Construction Funds, 352 F. Supp. 177 (S.D.N.Y.), *aff'd mem.*, 486 F.2d 1393 (2d Cir. 1973) 66
Chesapeake Bay Bridge & Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 74

PAGE

Ciulla v. State, 191 Misc. 528, 77 N.Y.S.2d 545 (Ct. Cl. 1948) 66
Commonwealth v. 2101 Cooperative, Inc., 27 Pa. D.&C. 2d 405 (C.P. 1961), *aff'd per curiam*, 408 Pa. 24, 183 A.2d 325 (1962) 53
C.N.S. Enterprises, Inc. v. G. & G. Enterprises, Inc., CCH Fed. Sec. L. Rep. ¶94,938 (7th Cir., Jan. 13, 1975) 40
Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) 51

Davenport v. United States, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959) 28, 41, 51-52
DeVoe v. Ostrander, No. C-3-74-95 (S.D. Ohio, Oct. 18, 1974) 77

Edelman v. Jordan, 415 U.S. 651 (1974) 71, 76, 77, 78
El Khadem v. Equity Securities Corp., 494 F.2d 1224 (9th Cir.), *cert. denied*, 95 S. Ct. 183 (1974) 51, 55
Employees v. Missouri Public Health Department, 411 U.S. 279 (1973) 76, 77

F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 94 S. Ct. 2157 (1974) 3
Federal Deposit Insurance Corp. v. Winton, 131 F.2d 780 (6th Cir. 1942) 34
Ferland v. Orange Groves of Florida, Inc., 377 F. Supp. 690 (M.D. Fla. 1974) 50
Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) 75
Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150 (W.D. Tex. 1972) 68

PAGE

Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) 78
Frye v. Taylor, 263 So. 2d 835 (Fla. App. 1972) 56

Grenader v. Spitz, CCH Fed. Sec. L. Rep. ¶95,008 (S.D. N.Y., Mar. 5, 1975) 41

Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971) 42
Hurst v. Dare To Be Great, Inc., 474 F.2d 484 (9th Cir. 1973) 56

International Longshoremen's Association v. North Carolina State Ports Authority, 370 F. Supp. 33 (E.D.N.C. 1974) 66, 74, 77

J. I. Case Co. v. Borak, 377 U.S. 426 (1964) 3

Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969) 75
Kent v. Quicksilver Mining Co., 78 N.Y. 159 (1879) 68
Knight v. New York, 443 F.2d 415 (2d Cir. 1971) 69

Lehigh Valley Trust Co. v. Central National Bank of Jacksonville, 409 F.2d 989 (5th Cir. 1969) 40
Lemelson v. Ampex Corp., 372 F. Supp. 708 (E.D. Ill. 1974) 74
Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973) .. 40
Llanos v. United States, 206 F.2d 852 (9th Cir. 1953), *cert. denied,* 346 U.S. 923 (1954) 40

MacKethan v. Virginia, 370 F. Supp. 1 (E.D. Va.), *aff'd per curiam,* Civ. No. 74-1249 (4th Cir., Dec. 23, 1974) 77
Matherson v. Long Island State Park Commission, 442 F.2d 566 (2d Cir. 1971) 66

PAGE

Mathews v. Fisher, No. C-1-74-284 (S.D. Ohio, April 16, 1974), *appeal docketed sub nom.* Yeomans v. Kentucky Department of Banking & Securities, No. 74-2003 (6th Cir., Sept. 4, 1974) 77
McClure v. First National Bank, 497 F.2d 490 (5th Cir. 1974) 40
Miller v. Central Chinchilla Group, Inc., 494 F.2d 414 (8th Cir. 1974) 51
Mincola v. Arthur-Hardgrove Co. [1964-66 Transfer Binder] CCH Fed. Sec. L. Rep. ¶91,608 (S.D.N.Y. 1965) 75
Moore v. Gorman, 75 F. Supp. 453 (S.D.N.Y. 1948) 42
Moses v. Michael, 292 F.2d 614 (5th Cir. 1969) 51
Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970), *aff'd per curiam,* 452 F.2d 662 (2d Cir. 1971) 40, 41
Murphy v. Dare To Be Great, 3 Blue Sky L. Rep. ¶71,053 (D.C. Super. Ct. 1972) 56

Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971), *cert. denied,* 406 U.S. 933 (1972) 74
Namet v. United States, 373 U.S. 179 (1963) 3
New York Dormitory Authority v. Span Electric Corp., 18 N.Y.2d 114, 271 N.Y.S.2d 983 (1966) 66

Olympic Capital Corp. v. Newman, 276 F. Supp. 656 (C.D. Cal. 1967) 40
Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949) 75
Owens v. Roberts, 377 F. Supp. 45 (M.D. Fla. 1974) 74

PAGE

Parden v. Terminal Railway of Alabama Docks Department, 377 U.S. 184 (1964) 70-71, 73, 75, 76, 77
Pawgen v. Silverstein, 265 F. Supp. 898 (S.D.N.Y. 1967) 51
Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3d Cir. 1971) 74
People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972) 16, 37, 46, 61
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 68
Pfeffer v. Cressaty, 233 F. Supp. 756 (S.D.N.Y. 1963) .. 75
Pine Grove Manor, Inc. v. Director, 68 N.J. Super. 135, 171 A.2d 676 (1961) 53
Prendergast v. Long Island State Park Commission, 330 F. Supp. 438 (E.D.N.Y. 1970) 66
Prentice v. Hsu, 280 F. Supp. 384 (S.D.N.Y. 1968) 40
Price v. United States, 200 F.2d 652 (5th Cir. 1953) 51
Principe Compania Naviera, S.A. v. Board of Commissioners, 333 F. Supp. 353 (E.D. La. 1971) 74

Raub v. Gerkin, 127 App. Div. 42, 111 N.Y.S. 319 (2d Dep't 1908) 68
Rivet v. East Point Maritime Corp., 325 F. Supp. 1265 (S.D. Ala. 1971) 74

SEC v. Associated Gas & Electric Co., 99 F.2d 795 (2d Cir. 1938) 43
SEC v. Bailey, 41 F. Supp. 647 (S.D. Fla. 1941) 50-51
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 35
SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) 34, 35, 51

PAGE

SEC v. Crude Oil Corp., 93 F.2d 844 (7th Cir. 1937) 42
SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973) 50
SEC v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766 (D. Ore. 1972), *aff'd*, 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973) 57
SEC v. Gulf International Finance Corp., 233 F. Supp. 987 (S.D. Fla. 1963) 40
SEC v. McElvain, 417 F.2d 1132 (5th Cir.), *cert. denied* 397 U.S. 972 (1969) 51
SEC v. Orange Grove Tracts, 210 F. Supp. 81 (D. Mass. 1962) 50
SEC v. Payne, 35 F. Supp. 873 (S.D.N.Y. 1940) 42
SEC v. Tung Corp., 32 F. Supp. 371 (N.D. Ill. 1940) 42, 51
SEC v. United Benefit Life Insurance Co., 387 U.S. 202 (1967) 50
SEC v. Universal Serv. Ass'n, 106 F.2d 232 (7th Cir. 1939), *cert. denied*, 308 U.S. 622 (1940) 42
SEC v. Variable Annuity Life Insurance Co., 359 U.S. 640 (1959) 50, 61
SEC v. W. J. Howey Co., 328 U.S. 293 (1946) 39, 48, 50, 54, 58
Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906 (1961) 28, 46, 53, 54
Sire Plan Portfolios, Inc. v. Carpentier, 8 Ill. App. 2d 354 (1956) 47
State *ex rel.* Commissioner of Securities v. Hawaii Market Center, Inc., 52 Hawaii 642, 485 P.2d 105 (1971) 56
State *ex rel.* Healy v. Consumer Business Systems, Inc., 482 P.2d 549 (Ore. Ct. App. 1971) 56

PAGE

State *ex rel.* Park v. Glenn Turner Enterprises, Inc., 3 Blue Sky L. Rep. ¶71,020 (Idaho Dist. Ct. 1972) 56
State *ex rel.* Russell v. Sweeney, 153 Ohio St. 66, 91 N.E.2d 13 (1950) 53
State *ex rel.* Troy v. Lumbermen's Clinic, 186 Wash. 384, 58 P.2d 812 (1936) 52
State University of New York v. Syracuse University, 206 Misc. 1003, 137 N.Y.S.2d 916 (Sup. Ct.), *aff'd*, 285 App. Div. 59, 135 N.Y.S.2d 539 (3d Dep't 1954) ..66-67
Stockton v. Lucas, 482 F.2d 979 (Temp. Emer. Ct. App. 1973) 34, 41, 43
Story House Corp. v. New York Job Development Authority, 37 App. Div. 2d 345, 325 N.Y.S.2d 659 (3d Dep't 1971), *aff'd mem.*, 31 N.Y.2d 942, 340 N.Y.S. 2d 929 (1972) 66
Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) 35

Tcherepnin v. Knight, 389 U.S. 332 (1967) 33, 35, 37, 38, 42, 43, 50, 61
1050 Tenants Corp. v. Jakobson, 503 F.2d 1375 (2d Cir. 1974) 34, 40, 41
Thiele v. Shields, 131 F. Supp. 416 (S.D.N.Y. 1955) 75

U of F Students Cooperative, [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,347 (S.E.C. 1971) 41
United States v. American Trucking Associations, Inc., 310 U.S. 534 (1940) 34

Venture Investment Co., Inc. v. Schaefer, 3 Blue Sky L. Rep. ¶71,031 (D. Colo. 1972), *aff'd*, 478 F.2d 156 (10th Cir. 1973) 56

PAGE

Vincent v. P. R. Matthews Co., 126 F. Supp. 102 (N.D. N.Y. 1954) 68

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 13
Whitlow & Associates, Ltd. v. Intermountain Brokers, Inc., 252 F. Supp. 943 (D. Hawaii 1966) 40
Whitten v. State University Construction Fund, 493 F.2d 177 (1st Cir. 1974) 66

Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961) .. 66

Constitutional Provisions:

United States Constitution, Amend. 11 .....2, 65, 66, 70, 71, 73, 74, 78
United States Constitution, Amend. 14 3

Statutes:

Civil Rights Act of 1871, 42 U.S.C. §1983 3
Federal Employers Liability Act, 45 U.S.C. §51 *et seq.* 73, 75
Housing and Urban Development Act of 1974, 42 U.S.C. §3532 64
Internal Revenue Code of 1954 §216, 26 U.S.C. §216 51
N.Y. Abandoned Property Law §215 (McKinney Supp. 1974) 69
N.Y. Agriculture & Marketing Law §27(13) (McKinney 1972) 69
N.Y. Canal Law §§40(14), 85, 120 (McKinney Supp. 1974) 70

PAGE

N.Y. Correction Law §21 (McKinney 1968) 70
N.Y. Education Law §307(13) (McKinney 1969) 70
N.Y. Environmental Conservation Law §§15-1717(4), 15-1739(6) 70
N.Y. General Business Law §352-e (McKinney 1968, Supp. 1974) 37, 46, 60
N.Y. Highway Law §29(14) (McKinney 1962) 70
N.Y. Laws, 1926, ch. 823,
§16, 21, 38(8), 42 7
§30(2) 76
N.Y. Laws, 1968, ch. 519, §4 7
N.Y. Laws, 1968, ch. 1085 7
N.Y. Laws, 1969, ch. 528, §3 8
N.Y. Laws, 1969, ch. 1066 9
N.Y. Limited Profit Housing Companies Law,
N.Y. Laws, 1955, ch. 407 60
N.Y. Mental Hygiene Law §71.33 (McKinney Supp. 1974) 70
N.Y. Private Housing Finance Law (McKinney 1962, Supp. 1974)
§§1-59 5
§11 5
§13 ..... 8, 9
§13(7) 10
§15(c) 9
§17 8
§20(1) 8
§21 8
§22(2) 77
§25 ..... 13, 77
§26(1)(b) 13, 77

PAGE

§27 8
§28 ..... 29, 50
§29 8
§31(1) 8
§31-a 30
§32 8
§32(1) 68
§32(1)(a) 9
§32(5) 33, 65, 67, 68, 69
§32(7) 9
§35(3) 29, 50
§42(2) 8
§44 ..... 7, 65
§44(9) 8
§46(8) 7, 66
§47 7
§55 8
§85-87 7

N.Y. Public Authorities Law (McKinney 1970, Supp. 1974)
§§1682-86 (New York State Dormitory Authority) 7
§§1805-09 (New York State Job Development Autority) 7

N.Y. Public Housing Law (McKinney 1955, Supp. 1974) 5
N.Y. Real Property Actions & Proceedings Law
§1541 (McKinney 1963) 69
N.Y. State Law §59-b (McKinney 1952) 70
N.Y. Tax Law §615 (McKinney 1966, Supp. 1974) 51
Securities Act of 1933
§2(1), 15 U.S.C. §77b(1) 3, 33, 48, 57, 71
§2(2), 15 U.S.C. §77b(2) 71

PAGE

§17(a), 15 U.S.C. §77q(a) 3, 75
§17(c), 15 U.S.C. §77q(c) 42
§22(a), 15 U.S.C. §77v(a) 3

Securities Exchange Act of 1934

§3(a)(9), 15 U.S.C. §78c(a)(9) 71
§3(a)(10), 15 U.S.C. §78c(a)(10) 33, 38, 41, 48, 57, 71
§3(a)(12), 15 U.S.C. §78c(a)(12) 73
§10(b), 15 U.S.C. §78j(b) 3
§20, 15 U.S.C. §78t 3
§27, 15 U.S.C. §78aa 3

28 U.S.C. §1331 3
28 U.S.C. §1343 3

Rules:

United States Supreme Court Rule

23(1)(c) 3
40(1)(d)(2) 3

SEC Rules, Regulations, Releases and Other Materials:

American Dairy Leasing Corp., SEC Ruling (Dec. 3, 1971), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,584 51
Clemson Properties, Inc., SEC No-Action Letter (Aug. 13, 1971), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,387 46
Kentucky Blood Horse, Ltd., SEC Ruling (June 13, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,430 51

PAGE

McCulloch Properties, Inc., SEC No-Action Letter (Aug. 30, 1973, avail. Oct. 1, 1973) 46
900 Park Ave Corp., SEC No-Action Letter (June 9, 1972, avail. July 10, 1972) 45
Report of the Real Estate Advisory Committee to the Securities and Exchange Commission 90 n.26 (Oct. 12, 1972) 45
Rule 10b-5, 17 C.F.R. §240.10b-5 ..... 3, 39
Rule 235, 17 C.F.R. §230.235 ..... 42, 43, 44, 45
Securities Act Release No. 5223 (Jan. 11, 1972), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,487 .. 44
Securities Act Release No. 5316 (Oct. 6, 1972), [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,015 ..44-45
Securities Act Release No. 5347 (Jan. 4, 1973), [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,163 .. 44
Securities Exchange Act Release No. 11,220 (Jan. 31, 1975), CCH Fed. Sec. L. Rep. ¶80,096 44
Society Hill Towers, Inc., SEC Ruling (Dec. 27, 1974), CCH Fed. SEC. L. Rep. ¶80,103 45

Legislative Materials:

120 Cong. Rec. 5371-72 (daily ed. June 20, 1974) 64
Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933) 42, 73
Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) 72
Hearings on S. 875 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1933) .. 73
Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1933) 72, 73

PAGE

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 41, 42, 71, 72
Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961 7
Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955), *reprinted in part following* N.Y. Private Housing Finance Law §10 (McKinney 1962) 7
S. Rep. No. 47, 73d Cong., 1st Sess. (1933) 41, 42, 60, 61
S. Rep. No. 792, 73d Cong., 2d Sess. (1934) 41
S. Rep. No. 1123, 90th Cong., 2d Sess. (1968) 63

Treatises, Articles and Miscellaneous Materials:

Anderson, "Cooperative Apartments in Florida: A Legal Analysis," 12 U. Miami L. Rev. 13 (1958) 47
Black's Law Dictionary (rev. 4th ed. 1968) 36, 68
Coffey, "The Economic Realities of a 'Security': Is There a More Meaningful Formula?" 18 Case W. L. Rev. 367 (1967) 54
Comment, "Securities Regulation of Real Estate Programs," 27 Ark. L. Rev. 651 (1973) 47
Guide for Development of Limited Profit Housing, Preliminary Submissions, Executive Department, State of New York, Division of Housing and Community Renewal 35 (1971) 14-15
R. Jennings & H. Marsh, Securities Regulation 300 (3d ed. 1972) 47
Hannan & Thomas, "Defining Federal Securities," 25 Hasting L.J. 219 (1974) 54
Long, "An Attempt to Return 'Investment Contracts' to the Mainstream of Securities Regulation," 24 Okla. L. Rev. 135 (1971) 54

PAGE

1 L. Loss, Securities Regulation 492-93 (2d ed. 1961) ..43, 47
1 L. Loss, Securities Regulation 40 (Supp. 1962) 43
[1972] Op. N.Y. Att'y Gen. No. 56-B 65
Note, "Cooperative Apartment Housing," 61 Harv. L. Rev. 1407 (1948) 47
Note, "Cooperative Housing Corporations and the Federal Securities Laws," 71 Colum. L. Rev. 118 (1971) 46, 54-55
Note, "Real Estate Investments as Securities: The Sufficiency of the Howey Test," 6 St. Mary's L.J. 166 (1974) 53, 55
Rifkind & Borton, "SEC Registration of Real Estate Interests: An Overview," 27 Bus. Lawyer 649 (1972) 47-48
Sobieski, "Securities Regulation in California: Recent Developments," 11 U.C.L.A. L. Rev. 1 (1963) ..46, 48
Weiss, "Real Estate or A Security," N.Y.L.J., Nov. 18, 1974, at 1, col. 1 43
Wenig & Schulz, "Government Regulation of the Condominum in California," 14 Hastings L.J. 222 (1963) 46, 48
Zammet, "Securities Law Aspects of Cooperative Housing," N.Y.L.J., Jan. 8, 1973, at 4, cols. 1-7 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,

Petitioners,

—v.—

MILTON FORMAN, *et al.*,

Respondents,

—and—

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

—v.—

MILTON FORMAN, *et al.*,

Respondents.

RESPONDENTS' BRIEF

Questions Presented

1. Whether the 1,312,128 shares of common stock of a cooperative housing corporation publicly offered and sold to 15,372 separate purchasers for a $32,803,200 cash down-payment constitute "securities" within the meaning of the antifraud provisions of the federal securities laws.

2. Whether the New York State Housing Finance Agency, which is neither a "State" nor the *alter ego* of a State, can invoke the defense of immunity under the Eleventh Amendment.

3. Whether the State of New York has waived its immunity under the Eleventh Amendment by enacting Section 32(5) of the N.Y. Private Housing Finance Law or by its proprietary interest in the public sale of the common stock referred to in Question 1.

Statement

This action arises out of the public solicitation of venture capital for the construction of a mammoth cooperative housing development (P-A3).[1] The first nine counts of the amended complaint are brought on behalf of the named plaintiffs individually and as representatives of a class comprising the 15,372 subscribers to the stock of Riverbay Corporation ("Riverbay"), a cooperative corporation (A11-32). The remaining four counts are derivative claims brought on behalf of Riverbay itself (A32-37).

[1] References to the appendices to the petition for certiorari in No. 74-157 are prefaced by "P-" followed by the appendix letter and page number, *e.g.*, (P-A10). References to the Single Appendix in this case are designated by "A" followed by the page number, *e.g.*, (A2). References to the appendix submitted to the Court of Appeals below are designated by the page number followed by "a," *e.g.*, (160a). All references to the briefs of petitioners are designated as follows: Brief for Petitioners United Housing Foundation, Inc., *et al.* (UHF Brief); Brief for Petitioners the State of New York and the New York State Housing Finance Agency (N.Y. Brief); and Brief for the State of Ohio, Amicus Curiae (Ohio Brief). For reasons of clarity, the parties will be identified by their titles in the District Court. Thus, the respondents herein will be referred to as "plaintiffs" and the petitioners herein will be referred to as "defendants."

Jurisdiction of the amended complaint is invoked pursuant to Section 22(a) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §77v(a), Section 27 of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §78aa, and 28 U.S.C. §§1331 and 1343. The first two counts charge violations of Section 17(a) of the 1933 Act, 15 U.S.C. §77q(a); Section 10(b) of the 1934 Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated thereunder; and Section 20 of the 1934 Act, 15 U.S.C. §78t. The ninth count charges violations of the Civil Rights Act of 1871, 42 U.S.C. §1983.[2]

The United States District Court for the Southern District of New York dismissed the amended complaint for lack of federal jurisdiction (P-B1-29). On appeal, the United States Court of Appeals for the Second Circuit reversed unanimously (P-A1-22). A petition for rehearing and for rehearing en banc by the defendant State of New York ("State") and the defendant New York State Housing Finance Agency ("Agency") was denied unanimously by the

[2] This count is omitted from defendants' discussion of the "Statutes and Rule Involved" and the "Proceedings Below" (UHF Brief pp. 2, 6), although later acknowledged in passing (UHF Brief p. 7 n.5, N.Y. Brief p. 3). This count is asserted only against the Agency (A31). There are two underlying federally protected rights alleged therein, predicated on the securities laws of the United States and the Fourteenth Amendment (A32). Plaintiffs' argument is spelled out in detail in their reply brief in the Court of Appeals at pages 21-24. The petition for a writ of certiorari filed on behalf of the Agency does not raise any question which impairs the sufficiency of this ninth count insofar as it rests upon a Fourteenth Amendment claim. Accordingly, under this Court's rules, consideration of any such question is foreclosed. U.S. Sup. Ct. R. 23(1)(c), 40(1)(d)(2); F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 94 S. Ct. 2157, 2160 (1974); J. I. Case Co. v. Borak, 377 U.S. 426, 428-29 (1964); Namet v. United States, 373 U.S. 179, 190 (1963).

entire Second Circuit bench (A43). On January 20, this Court granted certiorari.

The Parties, and the State's Proprietary Interest in Co-op City

To put the appeal into proper perspective, and to furnish the context in which plaintiffs purchased Riverbay's stock, the salient facts will be reviewed, with references for each fact to both the amended complaint and the underlying documents. Virtually every material fact alleged in the amended complaint is taken verbatim from documents prepared by defendants which, by law, could not have been issued or executed without the express approval of the State or the Agency. *See* pp. 8-9, *infra*. References to the underlying documents are provided to demonstrate that there can be no dispute as to the facts, even though most of the defendants have yet to answer.

Plaintiffs seek to represent 15,372 families, many of whom invested their life savings in the purchase of stock in a low income cooperative housing project. As the District Court was "constrained to say":

> "[I]f ever there was a group of people who need and deserve full and careful disclosure in connection with proposals for the use of their funds, it is this type of group. By law, they would not be eligible for occupancy in Co-op City unless their financial resources were limited. The housing selection decision is a critical one in their lives. The cost of housing demands a good percentage of their incomes. Their savings are most likely to be minimal, and they probably don't have lawyers or accountants to guide them. Further, they are people likely to put a great deal of credence in

> statements made with respect to an offering by reputable civic groups and labor unions, particularly when the proposal is stamped with the imprimatur of the state." (P-B13).

Prior to May, 1965, defendants decided to undertake the construction of a large low-income housing development (A11 ¶12, 71a ¶13, 159a *et seq.*). This undertaking was part of the housing program of defendant United Housing Foundation ("UHF"), an amalgam of labor unions and other organizations, which had already been deeply involved in other similar projects (67a ¶4, 161a, 164a-65a). The authority for undertaking the construction and financing of this project was the New York State Mitchell-Lama Act, N.Y. Private Housing Finance Law §§1-59 (McKinney 1962, Supp. 1974) ("Private Housing Finance Law") (A9-10 ¶¶5-7, A11 ¶12, 65a, 67a, 168a).[3]

The declared purpose of the Mitchell-Lama Act is to provide "safe and sanitary dwelling accommodations for families and persons of low income, including aged persons of low income." Private Housing Finance Law §11. In keeping with that purpose, eligibility to purchase Mitchell-Lama housing is restricted to persons or families:

> "whose probable aggregate annual income at the time of admission . . . does not exceed six times the rental . . . except that in the case of families with three or

[3] Defendants refer elliptically to this statute as the "Housing Law" (UHF Brief p. 5, n.2 *et seq.*). This is misleading. New York has a number of statutes dealing with housing, including a "Public Housing Law" (McKinney 1955, Supp. 1974), which unlike the Private Housing Finance Law deals with subsidized housing. (*See* pp. 6-7, n.4, *infra*.)

more dependents, such ratio shall not exceed seven to one." *Id.* §31(2)(a).

The average carrying charge for such housing was originally represented to plaintiffs by defendants as approximately $23.02 per room per month, so that the permissible *maximum* annual earnings of a family eligible for a four-room apartment was $6,624 ($7,728 for a family of four or more). (*See Id.*; A11-12 ¶14, 174a). The plaintiffs' eligibility to purchase stock was determined against this standard and all persons earning more than the specified sums were excluded. As a result, it was predominantly retired persons on relatively low fixed incomes and young couples just starting out in life who became the purchasers (373a, P-B11-12). In sharp contrast, had the average carrying charge of $39.68 per room, which took effect on July 1, 1974, been set forth originally, the maximum permissible annual earnings for the same families in the same housing accommodations would have been $12,096 and $14,112, respectively, or nearly double the original ceiling, and people earning those larger sums would have been eligible to purchase Riverbay stock. However, they were not. The persons who were in fact eligible and did purchase the stock lacked the additional income to afford the higher carrying charges subsequently imposed (372a-74a, P-B11-12).

The Mitchell-Lama Act contemplates that the purchasers of the stock of the cooperative corporation will ultimately pay the entire cost of the housing.[4] In accordance with the

[4] *See* pp. 23-25, *infra*. Defendants repeatedly refer to the cooperative housing project as state "subsidized" (UHF Brief pp. 3, 4; N.Y. Brief p. 2). This is palpably misleading. The Mitchell-Lama Act was designed in part to provide for "State aid, *without cash subsidy provisions*, for the development of housing projects by

statute, the purchasers were required to pay down in cash at least ten percent of the total project cost[5] (168a, 171a). Private Housing Finance Law §21. The balance of the project cost was financed by the Agency by means of interest-bearing first mortgage loans to the cooperative corporation[6] (A12). The cooperative corporation in turn obtains the money to repay the mortgage through monthly carrying charges levied on plaintiffs. Private Housing Finance Law §§85-87.

The state, through its Division of Housing and Community Renewal, is entrusted with the implementation of the

housing companies formed under this Act." Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955) (emphasis added), *reprinted in part following* Private Housing Finance Law §10, at 8. Indeed, the very purpose of the statute was "to clarify the distinction between full-subsidized, low-income public housing programs administered by the State and its municipalities and *housing programs undertaken by private entrepreneurs with only limited public assistance, in the form of mortgage loans, aid in land assembly or site acquisition or tax abatement for a limited period.*" Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961, at 244, 245 (emphasis added).

[5] This percentage was later reduced by amendment to five percent. N.Y. Laws, 1968, ch. 519, §4.

[6] The State apparently chose to provide the financing through the Agency to avoid inclusion of the bond obligations as part of the State's debt. This type of financing is very common in New York. The Agency is a corporation separate from the State which obtains its funds through the sale of long-term tax-exempt bonds. The Agency's bonds are not full faith and credit bonds of the State. Private Housing Finance Law §46(8). Their tax-exempt status results in a lower interest rate than that of corporate bonds. This produces an ultimate benefit to the stockholders. For other examples of similar financing schemes, see N.Y. Public Authorities Law (McKinney 1970, Supp. 1974) §§1682-86 (New York State Dormitory Authority), §1805-09 (New York State Job Development Authority), and the statute generally. *See also* Private Housing Finance Law §§44, 47.

Mitchell-Lama Act. The Division is headed by a Commissioner who exercises all-encompassing supervisory powers (UHF Brief p. 8). No cooperative corporation can be created under this statute without his approval. Private Housing Finance Law §13.[7]

The cooperative corporation cannot borrow or give security without the Commissioner's approval (*Id.* §20(1)); its capital structure is dictated by law and subject to the Commissioner's approval (*Id.* §21); the cooperative may not acquire real property, enter into any contract for construction or alteration of any real property, or sell any property, encumber or lease any real property, make any contracts for operation of the project, issue a guarantee of payment or enter into contracts for payment of salaries to officers or employees without the Commissioner's approval (*Id.* §§17, 27, 29). The Commissioner has the power to fix or to overrule the cooperative's rental structure (*Id.* §31(1)); to investigate all aspects of the affairs of the cooperative and its dealings with others (*Id.* §32); and, in the event that the cooperative violates any provision of

[7] At the time when the project in issue was conceived and developed, the "chairman" of the Agency and its "chief executive officer" was this very "commissioner of housing." Private Housing Finance Law §43(2). Although this provision was subsequently somewhat modified (N.Y. Laws, 1969, ch. 528, §3), the close relationship between the Commissioner and the Agency continued; the Commissioner remained a member of the Agency and could be named chairman. Private Housing Finance Law §42(2). Significantly, the Agency's ability "to make mortgage loans and to undertake commitments to make mortgage loans" was and still is expressly made "[s]ubject to the approval of the commissioner of housing." *Id.* §44(9). Apart from the Commissioner's absolute control of the Agency's ability to grant mortgage loans, he is by law "designated to act for and in behalf of the agency in servicing the mortgage loans . . . of the agency." *Id.* §55.

its certificate, or of law, or of the mortgage, or of any order of the Commissioner, the Commissioner has the power to remove all of the cooperative's directors and to replace them with his own designees (*Id.* §§13, 15(c)) and to commence an action in the Supreme Court of New York for the purpose of having such violations stopped or prevented (*Id.* §32(7), *as amended* (McKinney Supp. 1974)). Thus, from the initiation of a project and continuing thereafter "state control is pervasive." (UHF Brief p. 8).

In addition to the State, the Agency and the stockholders, there are three entities involved in Mitchell-Lama cooperative housing: a sponsoring organization, in this case, defendant UHF; a general contractor, in this case, defendant Community Services, Inc. ("CSI"); and a cooperative corporation, in this case, defendant Riverbay. The relationship between these three entities and their interlocking directors makes understandable the otherwise incredible chain of events which took place.

UHF is a corporation organized under the Membership Corporation Law (95a).[8] Its membership consists of trade unions and other organizations. CSI is a corporation organized under the Business Corporation Law and is a wholly-owned subsidiary of UHF (A9 ¶4, 67a ¶5, P-B3).[9] In the past and on this project, CSI was the "general contractor and sales agent for [UHF] sponsored projects"

[8] The reference at P-A4 to UHF's being incorporated under the New York Not-For-Profit Corporation Law is an obvious, but immaterial, error as the statute was not enacted until 1969, eighteen years after UHF was incorporated. N.Y. Laws, 1969, ch. 1066, eff. Sept. 1, 1970.

[9] As will be shown, this critical fact was not disclosed in the Information Bulletins.

(A11 ¶12, 67a-68a ¶5, 149a-150a, P-B3). Riverbay was organized by UHF, to own the land and buildings constituting the housing project and UHF designated its directors (A9-10 ¶¶5, 8-11, A32 ¶87, 73a ¶¶16-17), except for the one designated by the Commissioner (Private Housing Finance Law §13(7)). These directors were, for the most part, also officers, directors or both of CSI and UHF (A10 ¶¶8-11, 67a-68a ¶5). Defendant Ostroff, President and Director of Riverbay, is also President and Director of CSI and Executive Vice-President and Director of UHF (A10 ¶¶8-10, 65a ¶1).[10] For all purposes, Riverbay was under the control and domination of UHF and CSI, who grievously misused their power to plaintiffs' detriment (A32 ¶87, 153a).

The First "Information Bulletin" (Prospectus)

Just as with every other large-scale public offering, the sale of Riverbay stock was promoted by means of a prospectus, called in this instance an "Information Bulletin." Under date of May 12, 1965, the defendants began to distribute the first Information Bulletin to thousands of prospective purchasers by means of the mails (A22 ¶39, 159a *et seq.*). The Information Bulletin stated that the total estimated cost of the project was $283,696,550; that $32,795,550 of this amount (the venture or risk capital) was to be provided by stockholder-subscribers through the purchase of stock and/or other equity obligations; and that the balance was to be financed by means of a $250,900,000 forty-

[10] Mr. Ostroff's predecessor, the late Abraham Kazan, was president of all three corporations (179a, 213a, 344a).

year first mortgage loan to Riverbay from the Agency (A12 ¶17, 171a).

The Information Bulletin further stated that:

> "It is anticipated that the General Contractor for the construction of the project will be Community Services, Inc., of 465 Grand Street, New York 2, New York. The performance of certain sub-contracts to be made with the General Contractor will be insured by a surety company or companies in amounts to be approved by the Commissioner, in favor of the Housing Company [Riverbay], the General Contractor and the New York State Housing Finance Agency.
>
> • • •
>
> "The construction contract will be executed prior to the mortgage loan closing. *The contract will provide for the payment of a lump sum price to the Contractor for the construction of the project, in the amount of $258,678,000,* subject to addition or deduction for change orders during the progress of construction as approved by the Commissioner.
>
> "The contract price will include the sum of $2,000,000 for builder's home office overhead, but there will be no builder's fee. *The risk of completing the construction within the lump sum price is upon the Contractor.*" (A13-14 ¶18, 171a-72a) (emphasis added).

The Information Bulletin then stated that a copy of the construction contract was or would be made available for inspection by prospective purchasers and that they "should familiarize" themselves with it (A13 ¶18, 168a).

The construction contract referred to, between CSI and Riverbay, dated June 18, 1965, provided for payment of a lump sum fixed price of $258,507,750[11] for the construction of the project, including a flat fee of $2,000,000 for CSI's "Home Office Overhead" (A13-14 ¶19, 214a). With respect to all items of construction cost other than the item of Home Office Overhead, which items were specified in the schedule attached to the contract, the contract provided:

> "[T]he Contractor [CSI] guarantees payment for said items notwithstanding that the actual cost for said items may exceed the amounts therein set forth." (A13-14 ¶19, 202a).

Thus, the potential subscribers were guaranteed in the contract as in the Information Bulletin that no increases in construction costs would be passed on to them.

The Information Bulletin continued:

> "Subject to the approval of the Commissioner, Community Services, Inc., of 465 Grand Street, New York, New York, has been retained by the Housing Company as sole agent for the sale of stock and/or other equity obligations and apartments in the projects, at such fees as the Commissioner shall approve, not to exceed the amount shown in the schedule of the estimated project cost." (A14 ¶20, 175a).

The fee of $450,000 was shown in the schedule annexed to and made part of the construction contract (214a). The

[11] We can only surmise that the difference of $170,250, between this amount and the amount set forth in the Information Bulletin, *supra*, is attributable to the fact that the Information Bulletin preceded the execution of the contract and some small reduction was effected in the interval.

sales agency agreement between CSI and Riverbay, dated June 18, 1965, actually provided that the total amount to be paid to CSI would not exceed the sum of $450,000 (A14 ¶21, 318a-19a).

The Information Bulletin also represented that the average monthly carrying charge, required for operation and maintenance of the project and payment of the mortgage loan, would be approximately $23.02 per room (A14 ¶22, 174a. *See also* Private Housing Finance Law §§25, 26 (1)(b)).

The Material Omissions

The Information Bulletin however, failed to disclose the following material facts:[12]

1. The original lump sum price was not adhered to on any of the previous Mitchell-Lama housing projects sponsored by UHF and built by CSI (148a-49a).

2. All of the defendants knew from the outset that the project could not be completed for $283,695,550 (A17 ¶30, 149a-53a).

3. CSI was a wholly-owned subsidiary of UHF (67a-68a ¶5, 407a).

4. The net worth of CSI was incredibly small in comparison with the scope and cost of the project and thus CSI could not have been held to the lump sum contract price even if the sponsor or the Commissioner had so de-

[12] On appeal from a motion to dismiss the complaint, all allegations as to fraudulent statements and material omissions must be deemed true. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174-75 (1965).

sired or if Riverbay had been free to act independently to enforce its own rights (149a-53a, pp. 15-16, *infra*).

5. In order to permit CSI to act as general contractor, although it only had 1/130 of the free liquid assets required by his own rules (151a-53a, 341a), the Commissioner simply waived the liquidity requirement (see pp. 15-16, *infra*).

6. There was another, but undisclosed, agreement between CSI and Riverbay, the administrative services agreement, which provided for payment to CSI of an additional $-00,000 (A16 ¶29, 329a *et seq.*).

The Commissioner's Waiver of His Own Liquidity Rule

Prior to the issuance of the Information Bulletin, the Commissioner had promulgated rules for the implementation of the Mitchell-Lama Act. Among those was a liquidity requirement for general contractors. That rule provided:

> "CONTRACTOR'S FINANCIAL PREQUALIFICATION REQUIREMENTS
>
> All GCs [General Contractors] submitting proposals for LPH [Limited Profit Housing] Companies shall have as free liquid assets $105,000 plus 5% of the amount of the contract in excess of $1,000,000, as set forth in the table below:

	Amount of Contract	Base	Base Amount	Above Base Amount Per $1,000
Above	$1,000,000	$1,000,000	$105,000	$50.00

> The determination of free liquid assets will be based on a financial statement of GC of recent date certified by a Certified Public Accountant." Guide for Development of Limited Profit Housing, Preliminary Submissions, Executive Department, State of New York Division of Housing and Community Renewal 35 (1971) (151a-52a).[13]

Applying that rule, the general contractor for Co-op City needed free liquid assets in excess of $13,000,000 in order to qualify.[14] By letter dated June 16, 1965, CSI forwarded to the Agency its *uncertified* financial statement as of December 31, 1964, showing "free liquid assets" of *less than $100,000* (341a *et seq.*). In the face of this startling inadequacy, the State casually endorsed in handwriting upon the face of the cover letter:

> "The financial statement and this letter supporting it has been requested as a matter of routine. In view of past performance of [General Contractor] and the technical setup of his operation, *the liquid asset prequalification has been waived in past and it is waived for this project also.*" (341a) (emphasis added).

The total net worth of CSI as shown in that same statement was only $201,872 (343a).

Bearing in mind that the Information Bulletin represented and the construction contract provided that CSI guaranteed completion of the construction for the lump sum price of $258,507,750, how could the Commissioner expect to hold CSI to that obligation, if it became impossible for it to perform at a profit or even at cost?[15] Since the

---

[13] We have been advised by the State that the above-quoted rule is substantially the same as the rule in effect in 1965.

[14] The cost of construction was contracted at $258,507,750 (214a).

[15] Even the sub-contractors' performance bonds, promised in the Information Bulletin (p. 11, *supra*), had been secretly waived (A18-19 ¶31(e)).

Commissioner knew that CSI had never lived up to its guarantee in the past, the necessary conclusion is that the Commissioner did not expect CSI so to perform (A17 ¶30, 148a-51a). The fact that the State had in addition waived its liquidity rule eradicated all margin of protection for Riverbay and, therefore, for plaintiffs.

In short, all of the economic safeguards so highly touted in the Information Bulletin either did not exist or were not worth the paper on which they were written.[16]

The Second "Information Bulletin" (Prospectus)

On or about May 15, 1967, defendants began to distribute a Revised Information Bulletin through the mails (A14 ¶23, 183a-200a). Since no change could have been made in the original bulletin without the Commissioner's "approval," this Revised Information Bulletin also bore the "imprimatur of the State" (P-B12). The Revised Information Bulletin substantially reiterated the statements with respect to financing, construction and sales made in the original Information Bulletin.[17] The Revised Information Bulletin, however, was as deficient as the original with respect to the above omissions.

[16] *See* People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972). It will be remembered that only persons of limited income were eligible to purchase Riverbay's stock (p. 6, *supra*) and that this public solicitation was directed at those people and not at a higher income group with greater investment experience. See also the dissenting opinion in Teherepnia v. Knight, 371 F.2d 274, 384 (7th Cir. 1967) and this Court's opinion in the same case, 389 U.S. 332, 345 (1967).

[17] The material differences were: (a) the total estimated development cost of the Co-op City project was $293,803,200, instead of $283,695,550 (A15 ¶25(a), 191a); (b) the venture or risk capital to be provided by stockholder-subscribers would be $32,803,200, instead of $32,795,550 (A15 ¶25(b), 191a); (c) the amount of the mortgage loan would be $261,000,000 instead of $250,900,000 (A15 ¶25(c), 191a); (d) the average monthly carrying charge would be approximately $25.00 per room, instead of $23.02 (A15 ¶25(d), 194(a); (e) the lump-sum construction contract price was $267,830,750, instead of $258,507,750 (A15 ¶25(e), 192a), and (f) the fee to be paid to CSI as sales agent would be $500,000, instead of $450,000 (A15 ¶25(f), 195a and 348a).

The Changes in the Construction Contract

Both the Information Bulletin and the Revised Information Bulletin advised prospective stockholders that they were further protected from any improper costs being foisted upon them because:

> "The Commissioner must also approve all contracts executed by the Cooperative for the construction and operation of the development and is charged by law with the responsibility of keeping informed as to the general condition of the development, its capitalization and the manner in which the development is constructed, leased, operated and managed." (189a).

1. *The First Increase of $9,328,000*

Pursuant to his "responsibility" to plaintiffs, on April 14, 1967, the Commissioner approved the first increase in the building contract between UHF's wholly-owned subsidiary, CSI, and their captive, Riverbay, because of "an increase in the cost of construction" the very contingency from which plaintiffs were to be protected (A15-16, A17-18, ¶31, 215a-20a). The Revised Information Bulletin omitted any reference to the fact that the Commissioner had permitted a change in the "lump-sum price" contract, and

merely used the increased figure as if it were the original figure (192a), without even informing the existing purchasers of the retroactive increase.

2. *The Second Increase of $250,000*

On January 22, 1968, by agreement between CSI and Riverbay, again with the approval of the Commissioner, the lump-sum construction contract price was increased from $267,830,750 to $268,080,750, an increase of $250,000 and an aggregate increase of $9,578,000 from the original contract price (A17 ¶31(a), 221a-24a). This entire increase was for the express purpose of giving CSI an additional "fee" of $250,000 and was a complete violation of a limit contained in Article 12 of the contract itself confining any increase in CSI's fee to 1% of the dollar value of any change order (208a).

3. *The Third Increase of $1,900,000*

On March 29, 1968, by agreement between CSI and Riverbay, with the approval of the Commissioner, the lump-sum construction contract price was increased a third time, because of "an increase in the cost of construction" from $268,080,750 to $269,980,750, an increase of $1,900,000 and an aggregate increase of $11,478,000 from the original contract price (A17-18 ¶31(b), 225a-26a).

4. *The Fourth Increase of $40,519,250*

On October 9, 1969, by agreement between CSI and Riverbay, the lump-sum construction contract price was increased the fourth time, with the Commissioner's approval, because of "a further increase in the cost of construction" from $269,980,750 to $310,500,000, an increase of $40,519,250 (including a $500,000 increase in CSI's "overhead" fee, and an

aggregate increase of $51,997,250 from the original contract price (A18 ¶31(c), 229a-36a).

5. *The Fifth Increase of $30,000,000*

On July 7, 1971, by agreement between CSI and Riverbay, again approved by the Commissioner, the lump-sum construction contract price was increased the fifth time, because of "a further increase in the cost of construction" from $310,500,000 to $340,500,000, an increase of $30,000,000 (including another increase of $300,000 in CSI's fee) and an aggregate increase of $81,997,250 from the original contract price of $258,507,750 (A18 ¶31(d), 237a-43a).

In each instance, the increases were made with the consent and approval of the Commissioner, but without any notice to the existing subscribers to Riverbay's stock[18]

---

[18] Defendants claim that plaintiffs "were advised of the increases in costs and carrying charges" (CHF Brief p. 9). The record reference is to a form letter allegedly circulated in 1968. While the question of a subsequent disclosure is irrelevant in determining whether Riverbay stock is a security, it must be noted that the receipt of that letter is denied (370a). Moreover, even if such a form letter was sent it would not amount to disclosure but to a further concealment of the material facts. The letter purportedly advised the subscribers that increases in four types of costs *might* result in an increase of an unspecified amount in the 1970-71 carrying charges. Two of these types of costs, operating costs and real estate taxes, are not material to the issues presented. The statement as to interest charges indicates that financing costs were running 1.2% over estimates but "declining slightly." As to construction costs, the letter recites that there will be "some construction cost increases" due to "escalations in regard to labor costs . . . unforeseen conditions . . . [and] inflationary pressures" (101a). It is impossible to read this letter and not conclude, as defendants apparently intended that the increases in construction costs from higher wages and inflationary pressures were the risk of Riverbay. Yet the construction contract between Riverbay and CSI placed on CSI, not Riverbay, the risk of loss in these areas (202a). Defendants have never claimed that the increased costs were due to "unforeseen conditions." Finally although defendants had amended that contract three times by October, 1968, increasing the cost of

(A17-19 ¶31, 18, 369a). Nor was any correction to reflect those increases made in the Revised Information Bulletin, which continued to be distributed in its unaltered form.[19] These increases in construction costs were, according to defendants, caused by "inflation" (76a ¶20, 377a). These increases were all passed on to Riverbay (171a-72a, 192a, 208a), although the Information Bulletins clearly represented and the construction contract expressly required that any such inflationary costs be absorbed by CSI. *See* pp. 11-12, *supra*.

6. *Increase of Service Fees by $2,510,000*

Because of and in addition to the increase in the price of the construction contract, the costs of related service fees were likewise increased by $2,510,000 without the knowledge or consent of plaintiffs.[20] Not one of these changes, also approved by the Commissioner, found its way into a writing sent to plaintiffs.

---

construction by $11,470,000, they did not see fit to disclose that fact in the letter.

[19] The District and Circuits Courts' references to further "revised estimates" (P-B11, P-A7) are erroneous insofar as they suggest that such revisions were included in a subsequent Information Bulletin.

[20] (a) Architect's fees increased from $2,350,000 in the original Information Bulletin (169a) to $2,550,000 in the Revised Information Bulletin (190a), and thereafter, to $2,975,000 (A19 ¶32a, 353a); (b) engineer's and laboratory fees increased from $750,000 in the original schedule (347a) to $1,275,000 (A19 ¶32(b), 353a); (c) surveyor's fees increased from $400,000 in the original schedule (347a) to $1,450,000 (A19 ¶32(c), 353a); (d) legal fees increased from $150,000 in the original schedule (347a) to $270,000 (A19 ¶32(d), 353a); (e) selling expenses (payable to CSI) increased from $450,000 (347a) to $600,000 (A19 ¶32(e), 353a); (f) administrative expenses (payable to CSI) increased from $200,000 (347a) to $300,000 (A20 ¶32(f), 353a).

Increases in the Mortgage

In order to pay for the increases, defendants caused Riverbay to enter into several modification agreements with the Agency, again without the knowledge or consent of plaintiffs, successively increasing the original mortgage loan to Riverbay by amounts sufficient to cover the increases in construction costs and related services, as well as further increases in financing costs resulting therefrom (A20 ¶33, 376a-77a). In approving and granting the increases in the mortgage loan, the Commissioner and the Agency participated in and abetted the other defendants' repudiation of the representations contained in the Information Bulletins and the breach of their fiduciary obligations to Riverbay and to plaintiffs, and caused Riverbay to exceed its authority to borrow, as defined by the subscription agreements with plaintiffs (A20 ¶33).

Thus, the mortgage loan was increased in four stages, from $236,655,710 to $375,755,710[21] (A20 ¶34, 258a-315a), to pay for the increases set forth above and also for increases of $1,670,000 in the fees of the State and the Agency, as well as increased interest of $64,750,000.[22]

The Resulting Increases in Carrying Charges

In order to repay the increased mortgage loan, defendants, with the Commissioner's approval, caused Riverbay to increase plaintiffs' average monthly carrying charge

---

[21] This figure excludes $46,000,000 which was added to finance construction of schools, a matter not presently in issue (371a).

[22] (a) Supervising fees (New York State Department of Housing and Community Renewal) increased from $2,509,000 to $3,510,000 (A20 ¶34a, 347a-61a); (b) Agency fees increased from $501,800

from an estimated $23.02 per room in 1965, to $25.00 in 1967, to $29.39 from July 1, 1970 through December 31, 1972, to $35.27 from January 1, 1973 through June 30, 1974, to $39.68 commencing July 1, 1974, all without plaintiffs' consent (A21 ¶35, 362a-64a, 372a-73a, P-B11).[23]

Throughout the period when these changes were taking place, defendants were soliciting "offers for shares of . . . [Riverbay's] capital stock" (A14-15 ¶¶23-24, A16 ¶28, 183a-202a) on the basis of Information Bulletins *which omitted every single one of these salient facts.* In other words, plaintiffs bought Riverbay stock for cash down-payments totaling $32,803,200, *inter alia,* to obtain housing at a cost of $23.02 and then $25.00 per room per month, whereas the actual but undisclosed charge was to be at least $39.68 per room per month and undoubtedly even more in the future. Defendants never disclosed any of these material changes to the plaintiffs who had already purchased stock and given up rent-controlled apartments on the basis of the original Information Bulletin (A17-20 ¶¶31-34, 368a *et seq.*, P-B12).

The Securities Sold Pursuant to the Information Bulletins

Contrary to defendants' claim that plaintiffs were merely offered an apartment (UHF Brief p. 26), it is clear that plaintiffs were invited to and did purchase common stock.

---

to $1,170,000 (A20 ¶34(b), 347a-61a); (c) title and recording expenses increased from $340,000 to $545,000 (A20 ¶34(c), 347a-61a); (d) interest, capitalized for the construction period, increased from $6,250,000 to $71,000,000 (A20 ¶34(d), 347a-61a).

[23] Some portion of the latest increases may be attributable to increased costs of operation and maintenance.

The Information Bulletin and the Revised Information Bulletin:

> "[I]nvite[d] offers for shares of [Riverbay's] capital stock and/or other equity obligations for sale in units which will be allocated to the 15,500 [revised to 15,372] apartments of the development all in accordance with the terms of the subscription agreement." (A14-15 ¶¶23-24, A16 ¶28, 178a, 196a).

The subscription agreement commenced:

> "RIVERBAY CORPORATION
>
> Subscription Agreement and Apartment Application
>
> (Limited to Residents of the State of New York)
>
> (1) I, (we) ....., hereinafter individually and collectively called the "Subscriber", hereby subscribe at the par value and principal amount thereof, to an aggregate of:
>
> [A specified dollar amount depending upon type of apartment chosen]
>
> par value of Class B capital stock of Riverbay Corporation, . . . for the purpose of acquiring land and constructing and operating a housing project . . . ." (104a).

The True Purchase Price of Riverbay Stock Was Never Disclosed to Plaintiffs

Each subscriber agreed to purchase 18 shares of Riverbay stock, at $25 par value per share, for each room in the apartment selected, for a cash payment of $450 per

room (89a, 172a-73a, 193a). Although nowhere revealed in the Information Bulletins, this sum was not the total purchase price but only a down-payment amounting to less than 12 per cent of that price.[24] The true price had been fixed by agreement of the defendants at $3,856 per room (347a). The difference between the down-payment and the total price was financed by the Agency through its mortgage loan to Riverbay. The amortization and interest expense of that mortgage loan was passed on to plaintiffs by Riverbay as part of the monthly carrying charges. Thus, when all the contract changes discussed above had taken place and the mortgage loan had been repeatedly increased to cover those changes and related increases, the total cost of the project rose from $283,695,550 to $418,203,982 (*compare* 171a *with* 353a). The net effect of the defendants' actions was to raise the purchase price of Riverbay stock from $3,856 to $5,737 per room (*compare* 347a *with* 353a). The actual purchase price of plaintiffs' stock was more than 11.7 times the represented price. Needless to say, this feat was accomplished by defendants without even notifying plaintiffs, much less obtaining their consent.[25]

It will be remembered that to be eligible for a four room apartment a family of two was permitted a maximum annual gross income of $6,624. The cost of Riverbay stock to that family leaped from $15,424 to $22,948. The fact that, for eligibility purposes, their maximum permissible income would increase in direct proportion to the escalating cost of Riverbay stock was of small comfort to those plaintiffs on fixed retirement incomes who had already made their purchase and taken occupancy in reliance upon the representations in the Information Bulletins.

[24] The Information Bulletins and the stock subscription agreement described the $450 per room price as the "total equity requirement" (105a, 173a). This misstatement is perpetuated in defendants' brief (UHF Brief p. 12).

[25] Despite having grossly misstated the purchase price of plaintiffs' stock and then secretly increasing it to cover the cost of their self-dealing in violation of all their representations and contracts, defendants now unblushingly claim that plaintiffs obtained an "outstanding bargain" (UHF Brief p. 9 n.8). Even if true, the claim, which is not based on any facts in the record, would scarcely excuse defendants' fraudulent conduct.

The Economic Inducements Contained in the Information Bulletins

Just as with any securities offering, there were economic inducements to the investors. The Court of Appeals found that there were substantial economic inducements to potential purchasers in this huge offering, in the form of (a) income to be derived from commercial tenants and realized by plaintiffs through reduced carrying charges; (b) savings in federal and State personal income taxes resulting from the right to deduct a pro rata share of interest and real estate taxes paid by Riverbay; and (c) savings of the difference between the cost of living in Co-op City (at the represented rates) and the "going rate" for comparable housing (P-A15-18).

Defendants assert flatly, "The Co-op City Information Bulletins contain no representation with respect to potential profit or income" (UHF Brief p. 26). That statement is plainly contradicted by the record. The Information Bulletin states:

> "If there should be a surplus of income over expenses at the end of the year, the Board of Directors, after

providing for adequate reserves, may return this surplus, or part of it, to the cooperators in the form of a rent rebate[26] (162a).

• • •

"The Advantages of
Cooperative Housing

"People find living in a cooperative community enjoyable for more than one reason. Most people join, however, for the simple reason that it is a way to obtain decent housing at a reasonable price (166a).

• • •

"In many cooperatives the self-help method which made the housing possible is extended to meet the needs of consumers in other fields. It is not uncommon for cooperators to organize cooperative foodmarkets, credit unions, nursery schools, insurance plans, health plans, —all designed to benefit themselves (169a).

• • •

"All of the apartments as well as the community facilities will be centrally air conditioned. This will be possible because Co-op City will operate its own power plant. The plant will provide the community with its own electric power, hot water, heat and air conditioning.

"The project will contain parking facilities to accommodate 10,850 automobiles which will be provided for rental to tenant-cooperators at $17.50 per month (175a).

• • •

[26] This is the "dividend" referred to by the Court of Appeals at P-A16.

"Tax Benefits (*Id.*)

• • •

"The present laws and regulations entitle tenant-stockholders of cooperative housing corporations to deduct from their gross income for Federal and New York State income tax purposes their proportionate share of real estate taxes and interest paid by such cooperative corporations. The actual tax saving to an individual would depend upon the respective taxpayer's income tax bracket." (*Id.*).

It cannot be seriously urged that plaintiffs, all people of limited means, willingly invested what for many was their life savings without any hope of financial gain. Defendants appear to contend that plaintiffs paid out $32,803,200 in hard cash merely to further defendants' cooperative effort. Plaintiffs, however, made their purchases for the total package which defendants offered: stock ownership in a giant cooperative real estate enterprise, tax deductions, the possibility of dividend income, and decent living accommodations at a real dollar saving. Defendants' attempt to deprive plaintiffs of the protection of the federal securities laws by artificial formal distinctions between kinds of economic inducements was properly rejected by the Court of Appeals.

The Incidents of Ownership of Riverbay Stock

Defendants have repeatedly argued that there are certain unique conditions attached to Riverbay's common stock which somehow justify depriving plaintiffs of protection under the antifraud provisions of the federal securities laws. The argument is refuted by an examination of the

stock itself.[27] 15,372 stockholders have purchased 1,312,128 shares of Riverbay common stock[28] (A7 ¶2(b)). Each share has a par value of $25, for a total par value of $32,803,200, which has actually been paid in by plaintiffs and spent by Riverbay for construction (A23 ¶44). Had Riverbay gone bankrupt, plaintiffs would have lost most if not all of their investment (P-A18). It was therefore risk capital in every sense of the term. *See* pp. 54-57, *infra*.

The stockholders have the customary right to elect directors and vote on those other matters which normally are reserved to stockholders.[29] Each stockholder has the right to take income tax deductions for a portion of his monthly carrying charges (175a, 195a, 396a-98a). He has the right to enter into an occupancy agreement for an apartment[30] (105a, 108a-19a). His shares, upon his death, pass to his spouse (135a).

---

[27] In an effort to becloud the fact that plaintiffs are stockholders, defendants persist in referring to them as "members" and to their shares as "memberships" (UHF Brief pp. 7, 10 *et seq.*). Of course even if only "memberships" were involved, a security would nevertheless be present. *See, e.g.*, Davenport v. United States, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811. 361 P.2d 690 (1961).

[28] The plaintiffs will not actually receive their stock certificates until the Commissioner certifies that the project has been completed and paid for (171a, 191a). The Court of Appeals correctly held that this factor in no way affects plaintiffs' claims asserted herein (P-A9).

[29] The By-Laws provide for one vote per apartment, rather than one vote per share, which the Court of Appeals found had "little, if any, functional difference" in view of the fact there are 1,312,128 shares of stock with no stockholder owning more than 126 of those shares or .0096% (P-A10 n.8, 89a).

[30] The subscription agreement is also an application for an "occupancy agreement . . . for a term of not more than three years, which shall be automatically renewable, unless terminated at the end of any three-year term by [Riverbay] or the tenant-cooperator" (105a).

Riverbay leases commercial and office space to tenants (not stockholders) and operates parking and washing machine facilities. The millions of dollars of rental income from Riverbay's business activities are available for payment of its general expenses, thereby reducing the amount of carrying charge income required from the plaintiffs (P-A16). By law, after all costs and expenses are paid, Riverbay must pay any surplus to the plaintiffs in the form of a dividend. Private Housing Finance Law §28.[31] Similarly, in the event of a dissolution, upon the repayment of all outstanding indebtedness, all remaining assets are required to be distributed to the stockholders. *Id.* § 35(3). Yet, notwithstanding all of those attributes, defendants baldly assert that this stock "has no independent significance or meaning" (UHF Brief p. 12).

The only restriction on the ownership of Riverbay stock worthy of mention is the provision in Riverbay's By-Laws that when a stockholder seeks to sell his stock, Riverbay has the right of first refusal at a price equal to the purchase price (131a-32a). The Court of Appeals correctly recognized that this was in no sense a unique provision (P-A11). Many corporations have similar provisions in their By-Laws or in stockholder agreements.[32] Moreover, in the event that Riverbay is unwilling or unable to exercise its right of first refusal, the stockholder is free to sell to anyone acceptable to Riverbay and to the Commissioner (132a-33a). The selling price in such a sale is not limited by

---

[31] Defendants' assertion that there is no "possibility of dividends" (UHF Brief p. 12) is thus contradicted by statute, as well as by their own Information Bulletins which speak of a "rent rebate" out of surplus (162a).

[32] *See, e.g.* Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812 (1957).

Riverbay's By-Laws at all.[33] Further, if there should be a default and forfeiture of the stockholder's interest, Riverbay is free to sell the stock "at public or private sale" (134a-35a). Any profit after payment of all indebtedness to Riverbay is to be turned over to the stockholder, who is also liable for any deficiency (*Id.*). Thus, there is even the "possibility of . . . appreciation in value," the very touchstone of defendants' argument (UHF Brief p. 11 *et seq.*). However, as will be shown, the possibility of appreciation in value is not a condition precedent to the application of the federal securities laws.

The "Profitability" of the Transaction From the Seller's Viewpoint

While it would seem to make little difference to a defrauded buyer whether or not the seller was motivated by an eleemosynary purpose or was an admi[illegible]vindler (P-A18), defendants insistently urge that thi[illegible] non-profit transaction from their point of view (UHF Brief p. 5). To lay this pretext to rest, once and for all, we enumerate some of the elements of profit to the defendants inherent in this "non-profit" transaction.

1. CSI, the general contractor, is a corporation organized for profit (A9 ¶4, 67a ¶5) and a wholly-owned subsidiary of UHF. The construction contract, after amendment, provided for payment by Riverbay to CSI of a $2,250,000 builders fee, which was included in the project cost (221a-

[33] In 1971, after the transactions in issue, the New York Legislature enacted Section 31a of the Private Housing Finance Law, which set the maximum resale price at the purchase price plus a pro-rata share of the amortization of the mortgage. N.Y. Laws, 1971, ch. 1148.

24a). In addition, also after amendment, CSI was to receive $600,000 in sales commissions (353a) and $300,000 for administrative services (353a). Thus, CSI reaped $3,150,000 as its share.

2. UHF, in addition to the benefits derived by virtue of being CSI's parent (a fact not disclosed in the Information Bulletins), also benefited in its own right. It solicited from plaintiffs "voluntary" loans of $10 per rental room payable at the time of apartment selection (166a, 187a). These loans were to bear interest at the token rate of 2 per cent. There are 72,896 rental rooms in Co-op City, resulting in a total loan of $728,896 to UHF at 2 per cent interest (348a).[34]

3. The State was paid $3,510,000 as its supervisory fee (353a). As the cost of the project went up, so did the State's fee.

4. The Agency was paid $1,170,000 as its financing fee (356a). Similarly, its fee increased as Riverbay's mortgage loan increased.

5. Defendants Szold, Altman and Alter are partners in the law firm of Szold, Brandwein, Meyers and Altman, attorneys for Riverbay (175a). Their firm was paid $210,000 in legal fees for this project (353a), and continues as its counsel.

6. Herman J. Jessor, the architect, was ultimately paid $2,975,000 for preparing the plans and specifications for

[34] The record is silent as to how many residents of Co-op City, if any, refused to make this "voluntary" loan.

the project (A19 ¶32(a), 353a). Mr. Jessor's address is stated in the Information Bulletins to be 465 Grand Street, New York, New York, coincidentally, the very same address given for UHF and CSI (167a, 188a).

7. In addition to the foregoing, there are the more subtle profits flowing to defendants from this kind of undertaking. For example, as alleged in the eighth count of the amended complaint, certain stores in Co-op City were knowingly leased for $500,000 less than their fair rental value (A31). It is not unreasonable to infer that these favored leases were given in consideration for extrinsic benefits received by defendants.

Ultimately, even the absence of personal profit motive on the part of defendants would not, in the words of the Court of Appeals,

> "eliminate the incentive for fraudulent or deceptive practices in the sale of cooperative stock. Whether it were to recoup advances already made or to retain a particular reputation even a nonprofit entity may encounter pressures which might have the tendency to change an otherwise objective and fair sales pitch to something likely to entice and mislead." (P-A18).

Summary of Argument

The United States District Court has subject matter jurisdiction because plaintiffs' amended complaint alleges that they were defrauded in the purchase of a security as comprehended by the antifraud provisions of the federal securities laws. The common stock of Riverbay Corporation is a security because it qualifies as either (1) "stock,"

or (2) an "investment contract," or (3) "any instrument commonly known as a 'security.'"

The defense of immunity under the Eleventh Amendment is not applicable to the Agency, which is not the *alter ego* of the State. Nor is this defense available to the State. It has been expressly waived by the New York State Legislature's enactment of Section 32(5) of the State's Private Housing Finance Law. It has also been waived by the State's embarkation upon a statutory housing plan designed to fulfill a State need with private funds, in which the State is directly involved in the public solicitation of venture capital by use of the mails and where State control over every aspect of planning, public solicitation of stock, construction and financing is pervasive.

ARGUMENT

POINT I

The common stock of Riverbay purchased by plaintiffs is a security within the meaning of the federal securities laws.

A. The common stock of Riverbay is within the meaning of the term "stock" in the statutory definition of a security.

Section 3(a)(10) of the 1934 Act provides in pertinent part:

> "The term 'security' means any . . . stock."[35] 15 U.S.C. §78c(a)(10).

---

[35] The statute is quoted in full at p. 3 of the Appendix to the UHF Brief. Almost the identical definition appears in Section 2(1) of the 1933 Act, 15 U.S.C. §77b(1). The statutes are treated *in pari materia*. Teherepnin v. Knight, 389 U.S. 332, 335-36 (1967).

The plain meaning of the statutory language, the relevant case law, legislative history, the Rules and Regulations of the Securities and Exchange Commission ("SEC"), the corresponding State blue sky laws and virtually all of the legal commentators are in accord that the statutory term "any . . . stock" means all stock, and in any event, would certainly include the stock of Riverbay Corporation.[36]

1. *The Statutory Language*

As this Court has frequently stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940).

See also Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18 (1944); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); *Browder* v. *United States*, 321 U.S. 335, 338 (1941).

The word "any" means "one indiscriminately of *whatever kind* or quantity." *Federal Deposit Insurance Corp.* v. *Winton*, 131 F.2d 780, 782 (6th Cir. 1942) (emphasis added). "Stock" is "incorporeal personal property representing a capital interest in a corporation." *Stockton* v. *Lucas*, 482 F.2d 979 (Temp. Emer. Ct. App. 1973). Clearly, the common stock of Riverbay qualifies under the express language of the statute. *1030 Tenants Corp.* v. *Jakobson*, 503 F.2d 1375 (2d Cir. 1974). *See also* cases cited at p. 41, *infra*.

---

[36] Ohio takes no position on the Second Circuit's holding that Riverbay stock is a security (Ohio Brief p. 2). New York merely adopts the UHF presentation (N.Y. Brief p. 2).

Moreover, even if the stock in issue lacked any single incident common to most stock, this would not alter its status. *See Tcherepnin* v. *Knight*, 389 U.S. 332 (1967). This Court has frequently instructed the lower courts to construe the federal securities laws "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). This fundamental principle underlies all of the case law on the subject.

2. *The Case Law*

On at least two occasions, this Court has carefully explained the sections of the statutes which define the term "security"—in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) and in *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967). In *Joiner*, the seminal case, the Court stated:

> "In the Securities Act the term 'security' was defined to include by name or description many documents in which there is common trading for speculation or investment. *Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning.* Others are of more variable character and were necessarily designated by more descriptive terms, such as 'transferable share,' 'investment contract,' and 'in general any interest or instrument commonly known as a security.' We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. *Instruments*

> *may be included within any of these definitions, as matter of law, if on their face they answer to the name or description.* However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security."'" 320 U.S. at 351 (emphasis added).

"Matter of law" is defined as "whatever is to be ascertained or decided by the application of statutory rules or the principles and determination of the law *as distinguished from the investigation of particular facts.*" Black's Law Dictionary, 1130-31 (rev. 4th ed. 1968) (emphasis added).

In applying its interpretation of the statutory definition, the Court observed:

> "In the present case we do nothing to the words of the Act, we merely accept them. It would be necessary in any case for any kind of relief to prove that documents being sold were securities under the Act. In some cases it might be done by proving the document itself, *which on its face would be a note, a bond or a share of stock. In others proof must go outside of the instrument itself as we do here.*" 320 U.S. at 355 (emphasis added).

This language compels the conclusion that if an instrument is a share of stock "on its face," it is within the scope of the statutes. As defendants concede, "Co-op City's cooperative

members subscribe to instruments *formally denominated 'stock'*" (UHF Brief p. 11) (emphasis added).

Moreover, the Court pointed out:

> "In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U.S. at 353.

This observation applies directly to the present case, where the Information Bulletins specifically "invite[d] offers for shares of [Riverbay's] capital stock" (178a, 196a). Even assuming *arguendo* that Riverbay's stock was not otherwise within the statutory definition, in view of this Court's ruling it would nevertheless be included because defendants represented it as such to the plaintiffs (see P-A12-13).

The *Joiner* rule was quoted and reaffirmed by this Court in *Tcherepnin* v. *Knight*, 389 U.S. 332, 339 (1967). On its facts *Tcherepnin* bears a striking resemblance to the instant case. The plaintiffs there were purchasers of withdrawable capital shares of an Illinois savings and loan association.[37] They brought a class action under Section 10(b) of the 1934 Act and Rule 10b-5 seeking equitable relief. The defendants claimed that these withdrawable capital shares were neither stock nor investment contracts. In support of their argument they urged, as do defendants herein, that the shares represented memberships, not investments (389 U.S. at 336); that the shares were not negotiable and only quali-

---

[37] These shares were "securities" under Illinois law, Teherepnin v. Knight, 371 F.2d 374, 383 (7th Cir. 1967) (dissenting opinion), just as Riverbay shares are securities under New York law. See N.Y. Gen. Bus. Law §352-e (McKinney 1968, Supp. 1974); People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972).

fiedly assignable (*Id.* at 337, 340); and that the shareholders had neither pre-emptive rights nor the right to inspect corporate books and records (*Id.* at 343). Moreover, although not discussed *in haec verba*, it is evident from a reading of the opinions of this Court and the Court of Appeals (371 F.2d 374 (7th Cir. 1967)) that the two principal arguments advanced by the defendants herein were also advanced in *Tcherepnin*, namely: (1) that the corporation involved was closely regulated by the State (defendants Knight and Hulman were State officials charged with supervision of the affairs of the issuer), and (2) that there was no element of capital appreciation attaching to the shares.[38]

This Court declined to bar access to the federal forum on the basis of factors which, although not common to all securities, "serve only to distinguish among different types of securities" (389 U.S. at 344). Terming the alleged absence of fluctuation in value and active trading on an exchange or over the counter "irrelevant . . . to the threshold question of whether a federal court has jurisdiction over the compiaint" (*Id.* at 345, 346), the Court had "little difficulty" in holding the shares includible as "stock"[39] under Section 3(a)(10) of the 1934 Act because of two factors: (1) the existence of a stock certificate and (2) the payment of dividends. 389 U.S. at 338, 339. Both of these factors are unquestionably present in this case, although the dividends may take the form of a reduction in carrying charges.

The policy considerations present in *Tcherepnin* are also present here. Ultimately, as a matter of policy, the Court

[38] The shares in *Tcherepnin* were redeemable at par and the plaintiffs' financial return was to come from dividends out of profits, if any. 389 U.S. at 338-39.

[39] This Court also held that the shares were includible as investment contracts. 389 U.S. at 339.

decided to extend "the investor protections afforded by the Securities Exchange Act" to the many small investors—like the plaintiffs in *Tcherepnin* and plaintiffs here—even "'less able to protect themselves than the purchasers of orange groves in *Howey*.'" *Id.* at 345.

This Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), also compels the conclusion that the stock involved in the instant case is a "security." The Ute Partition Act, 25 U.S.C. §677 *et seq.*, provided for a distribution of the assets of the Ute Indian tribe. A corporation, UDC, was formed for the purpose of managing all assets not susceptible of practical distribution. Ten shares of UDC stock were issued to each member of the tribe. All of the shares were physically delivered to the Bank of Utah, as transfer agent, and the bank then delivered its receipt for ten shares to each tribe member.

The shares were subject to several restrictions. First, the Ute tribe was to have the right of first refusal in the event that a member wished to sell his shares. If the tribe rejected the offer, a member could sell to a non-member but only at a price no lower than that offered to the tribe. Secondly, the UDC certificates stated that they did not represent ordinary corporate stock.

Among the litigation generated by the UDC plan was the so-called *Reyos* case, 406 U.S. at 144-54, in which a number of shareholders instituted suit under Rule 10b-5 against the Bank, its employees, and the United States. In finding that the defendants' conduct violated Rule 10b-5, this Court held that the certificates were "securities," despite the facts that the shares expressly stated that they were not ordinary corporate stock, had been issued as an

incident of tribal membership, and were subject to stringent restrictions. 406 U.S. at 152.

This so-called literal approach, based simply upon the language that Congress chose to utilize in the statute, has been consistently followed in the lower courts. *See, e.g., 1050 Tenants Corp.* v. *Jakobson*, 503 F.2d 1375, 1378 (2d Cir. 1974); *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F.2d 989, 991-92 (5th Cir. 1969); *Llanos* v. *United States*, 206 F.2d 852, 854 (9th Cir. 1953), *cert. denied*, 346 U.S. 923 (1954); *Movielab, Inc.* v. *Berkey Photo, Inc.*, 321 F. Supp. 806, 809 (S.D.N.Y. 1970), *aff'd per curiam*, 452 F.2d 662 (2d Cir. 1971); *Prentice* v. *Hsu*, 280 F. Supp. 384, 386 (S.D.N.Y. 1968); *Olympic Capital Corp.* v. *Newman*, 276 F. Supp. 646, 653 (C.D. Cal. 1967); *Whitlow & Associates, Ltd.* v. *Intermountain Brokers, Inc.*, 252 F. Supp. 943, 947-48 (D. Hawaii 1966); *SEC* v. *Gulf Intercontinental Finance Corp.*, 223 F. Supp. 987, 994 (S.D. Fla. 1963); *SEC* v. *Addison*, 194 F. Supp. 709, 721 (N.D. Tex. 1961).[40]

---

[40] Our research has disclosed no decision other than that of the District Court in this case in which a federal court has refused to treat as a security an instrument denominated as a share of stock. With respect to "notes," however, there is some conflict. Some courts have declined to characterize as "securities" notes given in personal loan or consumer credit transactions. *See, e.g.*, C. N. S. Enterprises, Inc. v. G. & G. Enterprises, Inc., CCH Fed. Sec. L. Rep. ¶94,938 (7th Cir. Jan. 13, 1975) (loan to purchase assets of small business enterprise); McClure v. First National Bank, 497 F.2d 490 (5th Cir. 1974) (commercial loan); Bellah v. First National Bank, 495 F.2d 1109 (5th Cir. 1974) (commercial loan); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973) (sale of franchise licensing agreement). In these transactions, of course, unlike transactions involving stock, there was neither a public offering nor even a purchase and sale as commonly understood. In SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943), this Court held that the statutes would apply if the "novel, uncommon or irregular devices . . . were widely offered," as were the Riverbay shares. Whatever the soundness of the rationale for excluding certain notes from the purview of the statutes, it clearly has no application here.

Moreover, every decision considering the application of the federal securities laws to cooperative stock has held in accord with the decision of the Court of Appeals below. *See, e.g., 1050 Tenants Corp.* v. *Jakobson*, 503 F.2d 1375 (2d Cir. 1974); *Grenader* v. *Spitz*, CCH Fed. Sec. L. Rep. ¶95,008 (S.D.N.Y., Mar. 5, 1975); *Ashton* v. *Thornton Realty Co.*, 346 F. Supp. 1294 (S.D.N.Y. 1972), *aff'd*, 471 F.2d 647 (2d Cir. 1973); *cf. Stockton* v. *Lucas*, 482 F.2d 979 (Temp. Emer. Ct. App. 1973); *Davenport* v. *United States*, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); *U of F Students Cooperative*, [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,347 (S.E.C. 1971).

In this case, however, the Court need not determine whether every conceivable share of common stock is covered by Section 3(a)(10) of the 1934 Act (or the parallel provision of the 1933 Act). The Court need only determine that the public solicitation of offers for 1,312,128 shares of Riverbay common stock through the mails and the sale of those shares to 15,372 purchasers for a $32,803,200 cash down-payment falls within the purview of the statutes. *See Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F.2d 662, 663 (2d Cir. 1971); p. 40, n.40, *supra*.

3. *The Legislative History*

The primary intention of Congress in enacting the federal securities laws was to reach all securities[41] other than those

---

[41] *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 6-7, 11 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933); S. Rep. No. 792, 73d Cong., 2d Sess. 14 (1934).

In conformity with the congressional purpose, the courts have interpreted the statute to reach many varied and unusual types of arrangement. *See, e.g.*, Affiliated Ute Citizens v. United States,

specifically excluded or exempted.[42] This intention is established beyond question by Congress' express determination to cover all securities subject to the existing blue sky laws of 47 States, when sold in interstate commerce or by use of the mails. H.R. Rep. No. 85, 73d Cong., 1st Sess. 10, 27-28 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 2, 4 (1933); Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933). As will be shown below, cooperative stock is subject to the blue sky laws of many States, including those of New York.

4. *Rules and Regulations of the SEC*

Contrary to defendants' contention (UHF Brief pp. 33-38), there is absolutely no inconsistency between the decision of the Court of Appeals and the Rules and Regulations of the SEC. Rule 235, 17 C.F.R. §230.235, is the only substantive rule or regulation applicable to stock in a housing cooperative. That rule exempts from *registration* the stock of certain smaller cooperative housing corpora-

406 U.S. 128 (1972) (Indians' shares of stock in mineral development corporation); SEC v. Universal Serv. Ass'n, 106 F.2d 232 (7th Cir. 1939), *cert. denied*, 308 U.S. 622 (1940) (application blanks used to solicit contributions to scientific crop growing enterprise); SEC v. Crude Oil Corp., 93 F.2d 844 (7th Cir. 1937) (bill of sale and contract for delivery of oil); SEC v. Payne, 35 F. Supp. 873 (S.D.N.Y. 1940) (contracts for the sale of silver foxes); SEC v. Tung Corp., 32 F. Supp. 371 (N.D. Ill. 1940) (contracts for cultivation and sale of tung tree acreages).

[42] An exemption from registration does not carry with it an exemption from the antifraud provisions of the federal securities laws. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332 (1967); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971); Moore v. Gorman, 75 F. Supp. 453, 456 (S.D.N.Y. 1948). *See also* Section 17(c) of the Securities Act of 1933, 15 U.S.C. §77q(c).

tions,[43] thus implicitly recognizing that the stock of a cooperative housing corporation is a security (P-A14).

There would have been no purpose in exempting certain cooperative housing shares from registration if cooperative shares were not otherwise generally subject to the provisions of the securities laws.[44] Weiss, "Real Estate or A Security," N.Y.L.J., Nov. 18, 1974, at 1, col. 1. Similar reasoning is found in *Tcherepnin* v. *Knight*, 389 U.S. 332, 341-42 (1967) and *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1970). The SEC's construction of the Act is entitled to considerable weight. As the court held in *SEC* v. *Associated Gas & Electric Co.*, 99 F.2d 795, 798 (2d Cir. 1938):

> "One of the principal reasons for the creation of such a bureau [the SEC] is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous."

Cf. Stockton v. *Lucas*, 482 F.2d 979, 984 (Temp. Emer. Ct. App. 1973).

[43] Rule 235 principally exempts housing cooperatives where the par value of the offering does not exceed $300,000. It is clear that Riverbay stock did not qualify for that exemption, since its par value is $32,803,200 (*see* p. 28, *supra*).

[44] Defendants misconstrue Professor Loss's remark that this reasoning was "too facile" as applying to plaintiff's argument concerning Rule 235 (UHF Brief p. 34). Professor Loss's comment was addressed to an argument based upon Rule 15a-2 promulgated under the 1934 Act. Rule 235 had not even been adopted at the time Loss's treatise was published. That Rule is treated at page 40 of the 1962 pocket supplement to his work. There is no doubt that Professor Loss was of the view that "when the ownership of an individual apartment is evidenced by stock in the cooperative, as it usually is, the federal and state securities statutes would seem literally to apply." 1 L. Loss, Securities Regulation 492-93 (2d ed. 1961).

Securities Act Release No. 5347 (Jan. 4, 1973), [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,163, relied upon by defendants (UHF Brief p. 36), has no bearing on cooperative shares. That release expressly applies only to "condominiums and other types of similar units." In fact, the release was issued to clarify the "uncertainty about when offerings of condominiums and other types of similar units may be considered to be offerings of securities" within the scope of the federal securities laws. There was no need to clarify the status of offerings of shares of cooperative real estate corporations, as opposed to condominium realty interests, because those offerings were already the subject of Rule 235. Indeed, Rule 235 is not even mentioned in Release No. 5347. Nor is it mentioned in the more recent release of January, 1975, in which the SEC reiterates its view that Release No. 5347 relates to "investment contracts involving condominiums" rather than shares of cooperative stock.[45] Securities Exchange Act Release No. 11,220 (Jan. 31, 1975), CCH Fed. Sec. L. Rep. ¶80,096, at 85,072 n.8.

Just as there is no substance to defendants' contention that the SEC's current position with respect to cooperatives is reflected in Release No. 5347, there is no substance to their contention that this release somehow rescinded Rule 235. When the SEC desires to rescind a Rule, it does so specifically and formally, as in the recent cases of Rules 154, 155 and 133. *See* Securities Act Release No. 5223 (Jan. 11, 1972), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,487; Securities Act Release No. 5316 (Oct. 6, 1972),

[45] Condominium units by themselves have traditionally been considered real estate, whereas shares of a cooperative corporation are personal property. *Compare* N.Y. Real Prop. Law §339-g (McKinney) *with* Stockton v. Lucas, 482 F.2d 979, 983-84 (Temp. Emer. Ct. App. 1973).

[1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,015. Defendants' further contention that the Real Estate Advisory Committee to the SEC recommended that condominiums and cooperatives should be subject to the same rules (UHF Brief pp. 34-36) is beside the point. Even if that Committee did recommend that the SEC alter its view with respect to cooperative stock, the SEC did not accept the Committee's recommendation. To the contrary, the treatment of cooperative shares remains precisely as the Real Estate Advisory Committee Report described it:

> "Occupancy interests in cooperative housing are currently viewed as 'securities', primarily because such interests are represented by 'stock'." Report of the Real Estate Advisory Committee to the Securities and Exchange Commission 90 n.26 (Oct. 12, 1972).

Defendants' unqualified assertion that the SEC staff is "re-examining the Rule 235 exemption in light of the Court of Appeals decision below," citing *Society Hill Towers, Inc.*, SEC Ruling (Dec. 27, 1974), CCH Fed. Sec. L. Rep. ¶80,103 (UHF Brief p. 36 n.32), is, to say the least, disingenuous. In that letter the SEC staff announced that it was reconsidering the availability of the exemption from registration "where the aggregate purchase price . . . exceeds $300,000" even though the aggregate par value of the shares involved was less than $300,000. In other words, what the staff is apparently considering is whether to confine the registration exemption to transactions where *both* the par value and the purchase price are below $300,000.[46]

[46] None of the other no-action letters cited by defendants warrant a contrary interpretation. 900 Park Ave. Corp., SEC No-Action Letter (June 9, 1972, avail. July 10, 1972), involved an offering whose par value was $150,000. Summit House Tenants

This "re-examination," then, is still additional proof that the stock of a cooperative housing corporation is, and the SEC treats it as, a security subject to the provisions of the federal securities laws.

5. *The State Blue Sky Statutes*

All of the States active in cooperative housing treat cooperative stock as securities under their respective State blue sky laws. Thus, New York, California, Florida and Illinois have so ruled for many years.[47] Obviously, the

---

Corp., SEC No-Action Letter (Jan. 6, 1972), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,611, involved an offering whose par value was stated "not to exceed $300,000" (UHF Brief p. 33 n.27). Clemson Properties, Inc., SEC No-Action Letter (Aug. 13, 1971), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,387, and McCulloch Properties, Inc., SEC No-Action Letter (Aug. 30, 1973, avail. Oct. 1, 1973) did not involve Rule 235 at all (UHF Brief p. 37).

Indeed, insofar as defendants' argument rests upon the cited no-action letters, it involves a fundamental fallacy. Each of the no-action letters relates only to exemption from the registration requirements of the 1933 Act, not to the antifraud provisions of either statute, thereby confirming rather than refuting plaintiffs' argument.

[47] New York—N.Y. Gen. Bus. Law §352-e (McKinney 1968, Supp. 1974); People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972).

California—In accord with Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906 (1961), the Attorney General of California has ruled that shares of stock in cooperative corporations are securities under its blue sky laws. *See* Note, "Cooperative Housing Corporations and the Securities Laws," 71 Colum. L. Rev. 118, 130 n.104 (1971); Sobieski, "Securities Regulation in California: Recent Developments," 11 U.C.L.A. L. Rev. 1, 7-8 n.83 (1963); Wenig & Schulz, "Government Regulation of Condominium in California," 14 Hastings L. J. 222, 223 (1963).

Florida—"We respectfully call your attention to page 621 of the Biennial Report of the Attorney General, 1935-1936, wherein an opinion was rendered by this Commission on February 13, 1935, which gives an affirmative answer to the question of whether or not

existence and construction of similar State statutes are persuasive in interpreting federal regulatory legislation having the same purpose. Furthermore, it must be remembered that one of Congress' purposes in enacting the 1933 Act was to bring under federal control those securities which, though subject to the blue sky laws of 47 States, were being sold in interstate commerce free of such control."[48]

6. *The Legal Commentators*

The view that "stock" specifically includes cooperative stock has been expressed by virtually all of the commentators. *See* R. Jennings & H. Marsh, Securities Regulation 300 (3d ed. 1972); 1 L. Loss, Securities Regulation 492-93 (2d ed. 1961); Anderson, "Cooperative Apartments in Florida: A Legal Analysis," 12 U. Miami L. Rev. 13, 21 (1958); Comment, "Securities Regulation of Real Estate Programs," 27 Ark. L. Rev. 651, 662 & n.58 (1973); Note, "Cooperative Apartment Housing," 61 Harv. L. Rev. 1407, 1425 (1948); Note, "Cooperative Housing Corporations and the Federal Securities Laws," 71 Colum. L. Rev. 118, 127 (1971); Rifkind & Borton, "SEC Registration of Real Es-

---

stock involved in a cooperative housing venture must be registered with this Commission, and further, that the salesmen therein must also be registered. You will note the concluding paragraph of this opinion reads: 'I can find no distinction between the sale of this stock and the sale of any other "security" within the terms of the Act which would in any manner take it out of the operation of the broad definition of "security" and "sale" as given in this Act.'" "Cooperative Housing Ventures," Dec. 28, 1955, *quoted in* Anderson, "Cooperative Apartments in Florida: A Legal Analysis," 12 U. Miami L. Rev. 13, 17 n.18 (1958).

Illinois—Sire Plan Portfolios, Inc. v. Carpentier, 8 Ill. App. 2d 354 (1956); Young, "Exemptions from Registration Under the Illinois Securities Law," 1961 U. Ill. L. Rev. 205, 207.

[48] *See* p. 42, *supra*.

tate Interests: An Overview," 27 Bus. Lawyer 649, 658 (1972); Sobieski, "Securities Regulation in California: Recent Developments," 11 U.C.L.A. L. Rev. 1, 7-8 (1963); Wenig & Schulz, "Government Regulation of Condominiums in California," 14 Hastings L. J. 222, 223 (1963); Zammet, "Securities Law Aspects of Cooperative Housing," N.Y.L.J., Jan. 8, 1973, at 4, Cols. 1-7. Thus, it is clear that the commentators, like Congress, the State legislatures, the SEC, and the federal and State courts, overwhelmingly support plaintiffs' position that cooperative housing stock is a security.

B. Alternatively, the shares of common stock of Riverbay purchased by plaintiffs are "investment contracts" within the meaning of the federal securities laws.

Section 3(a)(10) of the 1934 Act further provides:

> "The term 'security' means any . . . investment contract."[49] 15 U.S.C. §78c(a)(10).

Both the District and Circuit Courts below applied this Court's classic test of an investment contract, articulated in *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946):

> "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." (P-A15, P-B20-21)

There has never been any "serious argument [that] the first and last requirements" of the above-quoted test are

[49] Section 2(1) of the 1933 Act, 15 U.S.C. §77b(1), contains the same language.

satisfied in the instant case (P-B21). Defendants contend in support of their argument only that the Information Bulletins contain no economic inducements and, therefore, plaintiffs, when they purchased Riverbay's common stock, could have had no expectation of "profit" (UHF Brief pp. 25-32). The economic inducements which are in fact contained in the Information Bulletins are set forth at pages 25-27, *supra*. It is immaterial whether these inducements amounted to promises of "galactic profits," a condition defendants seek to engraft on the statute (UHF Brief pp. 25-26). The antifraud provisions of the securities laws are designed not only to protect those who speculate for huge returns, but to protect those who invest their savings in the expectation of a modest return. *See Tcherepnin* v. *Knight*, 389 U.S. 332, 345 (1967).

Defendants' contention with respect to expectation of profit is without basis in fact or law. Even assuming that the concept of profit is limited to direct monetary return on one's investment (UHF Brief p. 25), there is in actuality the inducement of such an expectation and the possibility of its realization in this transaction. Plaintiffs stand to realize a monetary gain on the sale of their stock in the event that Riverbay fails to exercise its right of first refusal or in the event that stock is sold to satisfy a default. See page 30, *supra*. Moreover, there is a distinct possibility of dividends and apportionment of profits, assets and earnings. The $4,269,000 income which Riverbay receives from its extensive commercial operations (361a)[50] is, after direct expenses, realized by Riverbay's stockholders as a dividend in the form of a reduction in

[50] *See* p. 29, *supra*. Contrary to defendants' assertion, the record at 361a is not "silent as to the income earned from these services" (UHF Brief p. 28), but is specific on that point.

carrying charges. In addition, if Riverbay's income from commercial tenants or enterprises exceeds the anticipated sum, or if expenses fall below the budgeted amount, dividends are mandated by statute. Private Housing Finance Law §28. The statute also provides for an apportionment of assets upon dissolution. *Id.* §35(3).

While capital gain may be the objective of many investors, it is by no means the objective of the purchasers of all instruments held to be investment contracts. For example, in *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959) the investor's motive was a higher income or yield for his premium dollars. The same was true of *SEC* v. *United Benefit Life Insurance Co.*, 381 U.S. 202 (1967). In *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973) and indeed in all "pyramid-type" sales schemes, the investor's expectation is not for a capital gain upon resale of his interest but for income from increasing the number of investors. And there was certainly no significant element of capital appreciation in *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967).

In the purchase of tax-sheltered investments, the investors' expectation is primarily, if not exclusively, focused upon the tax deductions against ordinary income available to him. There is frequently no likelihood of a capital gain at all. Yet, these investments have all been held to be securities under the federal law.[51] A similar tax induce-

[51] Examples include (1) citrus grove interests—SEC v. W. J. Howey, 328 U.S. 293 (1946); Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953), *cert. denied*, 347 U.S. 925 (1954); Ferland v. Orange Groves of Florida, Inc., 377 F. Supp. 690 (M.D. Fla. 1974); SEC v. Orange Grove Tracts, 210 F. Supp. 81 (D. Mass. 1962); (2) tung grove acreages—SEC v. Bailey, 41 F. Supp. 647

ment was held out to plaintiffs, to wit, the right to deduct on their individual income tax returns the portion of their monthly payments to Riverbay representing real estate taxes and mortgage interest (175a, 195a).[52] In *El Khadem* v. *Equity Securities Corp.*, 494 F.2d 1224 (9th Cir.), *cert. denied*, 95 S. Ct. 183 (1974), the court stressed that both the inducements and plaintiff's expectations consisted of a tax advantage in the right to deduct interest and investment leverage.

Further, both federal and state courts have found investment contracts present even where there was no direct monetary benefit to the investor. Thus, in *Davenport* v.

(S.D. Fla. 1941); SEC v. Tung Corp., 32 F. Supp. 371 (N.D. Ill. 1940); (3) contracts for the sale of fur-bearing animals—Miller v. Central Chinchilla Group, Inc., 494 F.2d 414 (8th Cir. 1974) (chinchillas); Ahrens v. American-Canadian Beaver Co., 458 F.2d 607 (10th Cir. 1970) (beavers); Continental Marketing Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (beavers); SEC v. Payne, 35 F. Supp. 873 (S.D.N.Y. 1940) (silver foxes); (4) dairy cattle operations—American Dairy Leasing Corp., SEC Ruling (Dec. 3, 1971), [1971-72 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,584; (5) thoroughbred horse lease and boarding agreements—Kentucky Blood Horse, Ltd., SEC Ruling, June 13, 1973, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,430; (6) oil, gas and mineral leases and drilling contracts—SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) (oil and gas leases); SEC v. McElvain, 417 F.2d 1134 (5th Cir.), *cert. denied*, 397 U.S. 972 (1969) (oil, gas and mineral leases); Moses v. Michael, 292 F.2d 614 (5th Cir. 1969) (oil and gas leases); Price v. United States, 200 F.2d 652 (5th Cir. 1953) (oil and gas leases); (7) real estate syndications—Pawgen v. Silverstein, 265 F. Supp. 898 (S.D.N.Y. 1967).

[52] *See* Internal Revenue Code of 1954 §216, 26 U.S.C. §216; N.Y. Tax Law §615 (McKinney 1966, Supp. 1974). Defendants urge that this deduction is available to a Riverbay shareholder as a "homeowner and not because he owns a security" (UHF Brief p. 30). However, plaintiffs do not own their homes; all they own is their stock. It is upon the ownership of cooperative stock that the availability of the tax deduction is conditioned.

United States, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959), the Court of Appeals for the Ninth Circuit found that the mere expectation of employment and job security was sufficient to make a certificate of membership in a cooperative a "security." The defendants in that case were convicted under the 1933 Act of a conspiracy "to defraud in the sale of securities." 260 F.2d at 593. The "securities" were membership certificates "in the Mt. Hood Hardboard and Plywood Cooperative." *Id.* The economic inducement for the purchasers was solely:

> "that purchasers of said memberships would obtain continuous employment and job security in a large modern sawmill, plywood, and hardboard plant to be erected and owned and operated by the members thereof on a cooperative plan." *Id.*

It was neither alleged nor proved that the purchasers expected to resell their memberships at an appreciated value, or receive dividends or an apportionment of profits—the elements so stressed by defendants here. Similarly, in *State ex rel. Troy* v. *Lumbermen's Clinic*, 186 Wash. 384, 58 P.2d 812, 816 (1936), the Supreme Court of Washington held:

> "Profit does not necessarily mean a direct return by way of dividends, interest, capital account, or salaries. A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefited."

The Court of Appeals correctly observed a third profit element in the instant case is the savings to plaintiffs of the difference between the cost of living in Co-op City and the rental cost of "comparable accommodations," citing

Pine Grove Manor, Inc. v. *Director*, 68 N.J. Super. 135, 171 A.2d 676 (1961); *Commonwealth* v. *2101 Cooperative, Inc.*, 27 Pa. D. & C. 2d 405 (C.P. 1961), *aff'd per curiam* 408 Pa. 24, 183 A.2d 325 (1962); *State ex rel. Russell* v. *Sweeney*, 153 Ohio St. 66, 91 N.E.2d 13 (1950) (P-A17). As one commentator recently noted, "certainly inexpensive housing vis-a-vis the generally high cost of housing is a valuable benefit to any resident, whether rich or poor." Note, "Real Estate Investments as Securities: The Sufficiency of the Howey Test," 6 St. Mary's L. J. 166, 177 (1974).

Particularly pertinent is the opinion by Chief Judge Traynor of the Supreme Court of California in *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P.2d 906 (1961). The question before the court in that case was the applicability of the California blue sky laws (whose language parallels that of the federal securities laws) to the sale of memberships in a country club; the memberships were being sold to provide funds for the construction of the club. Notwithstanding the fact that the members would have "no rights in the income or assets of the club" (361 P.2d at 907) and were entitled only to the use of the club's facilities, the court, citing and applying *Howey*, held the memberships to be securities. It viewed the purpose of the legislation as "afford[ing] those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether . . . they expect a return on their capital in one form or [in] another." *Id.* at 909. Only because the purchasers joined together in risking their capital could there be any chance that the benefits of club membership would materialize. Hence, the court concluded:

> "the act is as clearly applicable to the sale of promotional memberships in the present case as it would be

had the purchasers expected their return in some such familiar form as dividends." 361 P.2d at 909.

Essentially the same situation obtains here, and the same result should follow: Without the $32,803,200 cash equity contributed by plaintiffs, Co-op City could not have been built and none of the attendant benefits would have materialized.

Silver Hills represents the needed enlargement of the *Howey* test to embrace those cases where the expectation of a direct monetary return is absent but there is the element of risk capital coupled with some economic benefit.

Nearly every commentator who has considered the subject approves of this result. Thus, in Coffey, "The Economic Realities of a 'Security': Is There a More Meaningful Formula?" 18 Case W. Res. L. Rev. 367, 412 (1967), the writer urges that the third element of the investment contract test should be satisfied whenever the investor is induced to expect some "reasonable benefit over and above the initial investment." Another commentator states that the benefit need not be "material or tangible and certainly not payable in money alone." Long, "An Attempt to Return 'Investment Contracts' to the Mainstream of Securities Regulation," 24 Okla. L. Rev. 135, 167 (1971). The salutary effect of *Silver Hills* is noted by yet another writer, who observes that under the ruling in that case "the absence of a profit motive does not provide a shield for the unscrupulous promoter who seeks to finance his operation by public solicitation of risk capital." Hannan & Thomas, "Defining Federal Securities," 25 Hastings L.J. 219, 233 (1974). *See also* Note, "Cooperative Housing Corporations and the Federal Securities Laws," 71 Colum.

L. Rev. 118, 130 (1971); Note, "Real Estate Investments as Securities: The Sufficiency of the Howey Test," 6 St. Mary's L.J. 166, 167-68, 175 (1974).

At least one Circuit Court has embraced the risk capital test where the traditional elements of profit were absent. In *El Khadem* v. *Equity Securities Corp.*, 494 F.2d 1224 (9th Cir.), *cert. denied*, 92 S. Ct. 183 (1974), the court explained:

"In return for supplying Nationwide with venture capital, Ms. El Khadem received a tax benefit and investment leverage." 494 F.2d at 1226.

• • •

"Second, appellants contend that Ms. El Khadem did not share in the profits of Nationwide. She was, however, provided a financial incentive by Nationwide to invest in their plan in the form of an opportunity to gain a tax advantage and to acquire investment leverage." *Id.* at 1229.

• • •

"In conclusion, the Nationwide plan was an investment of risk capital. Ms. El Khadem risked financial loss in order to gain certain financial advantages. Nationwide sought the use of Ms. El Khadem's capital, in the form of credit and collateral, for its own business purposes. Ms. El Khadem's risk depended on the skill with which Nationwide conducted its business ventures and managed her collateral and promissory note. It is precisely this type of risk venture that the Securities Act of 1933 and the Securities Exchange Act of 1934 were designed to control. Therefore, we hold that the Nationwide plan was a security as defined by the Acts." *Id.* at 1229-30.

See also Hurst v. *Dare To Be Great, Inc.*, 474 F.2d 482 (9th Cir. 1973); *Venture Investment Co., Inc.* v. *Schaefer*, 3 Blue Sky L. Rep. ¶71,031 (D. Colo. 1972), *aff'd on other grounds*, 478 F.2d 156 (10th Cir. 1973); *Murphy* v. *Dare To Be Great*, 3 Blue Sky L. Rep. ¶71,053 (D.C. Super. Ct. 1972); *Bond* v. *Koscot Interplanetary, Inc.*, 276 So. 2d 198 (Fla. App. 1973); *Frye* v. *Taylor*, 263 So. 2d 835 (Fla. App. 1972); *Florida Discount Centers, Inc.* v. *Antinori*, 226 So. 2d 693 (Fla. App. 1969), *aff'd*, 232 So. 2d 17 (Fla. 1970); *State ex rel. Commissioner of Securities* v. *Hawaii Market Center, Inc.*, 52 Hawaii 642, 485 P.2d 105 (1971); *State ex rel. Park* v. *Glenn Turner Enterprises, Inc.*, 3 Blue Sky L. Rep. ¶71,020 (Idaho Dist. Ct. 1972); *State ex rel. Healy* v. *Consumer Business Systems, Inc.*, 482 P.2d 549 (Ore. Ct. App. 1971).

From the point of view of the defrauded purchaser who has furnished risk capital, it makes little difference whether the economic benefit he expected was in the form of a direct monetary return. The risk is nonetheless present. As the Court of Appeals reasoned in this case, "if the corporation [Riverbay] went bankrupt, the shareholders would have sustained a loss in the amount of their investment" (P-A18).

Ultimately, plaintiffs alone must bear this risk. Neither the state, the sponsor (UHF), nor the contractor (CSI) put up one penny of venture capital. The first $32,803,200 was put up by plaintiffs and the rest was borrowed from the Agency, which received a first mortgage to secure repayment in full.[53] Plaintiffs are providing Riverbay with the funds to repay the interest and amortization on that

[53] Admitted in UHF Brief p. 8 n.7.

mortgage. Surely plaintiffs' shares qualify as investment contracts under the risk capital test. With equal certainty, application of that test would ensure a just result.

C. Alternatively, the shares of common stock of Riverbay purchased by plaintiffs are "instruments commonly known as a 'security'" within the meaning of the statutory definition.

Section 3(a)(10) of the 1934 Act further provides:

> "The term 'security' means . . . any instrument commonly known as a 'security.'" 15 U.S.C. §78c(a)(10).[54]

Not only are the shares of common stock of Riverbay either "stock" and "investment contracts," but they also qualify under a third alternative definition which includes "any instrument commonly known as a 'security.'"

Over a quarter of a century ago, in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943), this Court said:

> "Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security."'"

Precisely such a "novel, irregular and uncommon device," a pyramid sales scheme, came before the District Court in *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766 (D. Ore. 1972). The court found the scheme to be a

[54] Similar but even broader language appears in Section 2(1) of the 1933 Act, 15 U.S.C. §77b(1).

"security" because it was both an "investment contract" and an "interest or instrument commonly known as a security." [55] *Id.* at 733.

In applying the latter language, the court first noted:

> "[A]s a principle of statutory construction, these general categories cannot be disregarded or construed as devoid of meaning. Considering the nature of these statutes, the inclusion of these general phrases is yet another indication of the strength of the congressional desire that the statute be interpreted broadly, flexibly and liberally. Congress wanted to provide no loopholes for promotions in conflict with the purposes of the securities laws." *Id.* at 773.

The Court further stated that it doubted

> "Congress intended that in order to qualify under these general categories, a transaction must be commonly known to the man in the street as a security. Most securities are rather technical in nature and not likely to be understood except by the legal or financial community. It is sufficient that an offering be considered as a legal matter to be a security, regardless of the popular perception of it. Since the Supreme Court has indicated that it is appropriate to look to state law to give content to the terms used in the definition, *Howey, supra*, state decisions may be a most trustworthy authority on what is commonly known as a security." *Id.* at 773.

---

[55] On appeal, the Court of Appeals affirmed on the first ground, without reaching the second. 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973).

The court found two types of state decisions relevant: (1) decisions holding investment arrangements similar on their facts to be securities within the meaning of the applicable blue sky laws, and (2) decisions applying the risk capital analysis to investment arrangements, regardless of their similarity on the facts.

There is no question that this type of stock is "commonly known as a 'security'" in New York State. See p. 46, *supra*. Indeed upon the recommendation of the Attorney General, New York's blue sky law was amended in 1968 to require that the stock of cooperatives formed pursuant to the Mitchell-Lama Act, along with all other securities, be registered with the Attorney General. N.Y. Laws, 1968, ch. 1085. In his memorandum to the New York Legislature, the Attorney General, quoting from a 1966 report of the State Commission of Investigation, urged:

> "The law as presently constituted exempts limited profit housing companies from filing such a prospectus with the Attorney General.
>
> "The purpose of the present law is to protect the public against fraud and misrepresentations in the sale of interests in real estate, including cooperative apartments. The sale of cooperative 'luxury' apartments, as well as the sale of cooperative apartments in privately financed housing developments whose mortgages are insured by the Federal Housing Administration, are subject to the provisions of this section. However, under the present law, housing companies organized under the New York State Limited-Profit Housing Companies Law, are specifically exempted from the disclosures and filing require-

ments of §352-e, subdivision 1. Surely prospective middle-income tenant-cooperators are entitled to and should receive the same protection as those in the high income, 'luxury' class." *Id.* at 2340.

Thus, the reasoning of *Glenn Turner*, applied to the facts of the case at bar, compels the conclusion that Riverbay shares are "instruments commonly known as a 'security.'"

Similarly, Riverbay shares would also qualify as "securities" under this Court's alternative formulation in *Joiner* because they were "widely offered." See p. 57, *supra.*

D. Congress has mandated application of the federal securities laws to interstate sales of stock regardless of state regulation.

There is no provision in the federal securities laws which exempts securities because they are subject to state regulation or are issued by a corporation subject to such regulation, nor is there any language from which such an exemption can be implied. To the contrary, Congress made a considered determination not to exempt state-regulated securities from federal jurisdiction, stating:

> "The exemptions do not include the securities of public utilities and others more or less supervised by the respective State blue sky commissions. . . . State laws have failed to meet the present situation in the sale of utility and other securities in interstate commerce, with resultant loss to our people of billions of dollars." S. Rep. No. 47, 73d Cong., 1st Sess. 4 (1933).

Indeed, congressional dissatisfaction with the ineffectiveness of State regulation was an important factor leading

to the 1933 and 1934 Acts.[58] S. Rep. No. 47, 73d Cong., 1st Sess. 2 (1933).

As noted at page 46, *supra,* shares of stock in cooperative housing corporations are uniformly regarded as subject to the State blue sky laws. This is certainly true with respect to cooperative housing stock in New York. *See* UHF Brief p. 39 and *People* v. *Cadplaz Sponsors, Inc.*, 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972). And if there were ever any doubt as to shares of Mitchell-Lama stock, it has been put to rest by the State Attorney General himself. *See* pp. 59-60, *supra.*

In accordance with the expressed congressional purpose, this Court has not hesitated to extend the federal securities laws to interstate purchases and sales of securities subject to State blue sky laws regardless of whether they were also the subject of a "heavily regulated state statutory scheme" (UHF Brief p. 38). Thus, in *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), the Court applied the federal securities laws to withdrawable capital shares in a state-chartered and state-supervised savings and loan association. Similarly, in *SEC* v. *Variable Annuity Life Insurance Company*, 359 U.S. 640 (1959), where the Court noted initially that the defendants were "regulated under the insurance laws of the District of Columbia and several other States" (*Id.* at 642), those laws were held applicable to so-called variable annuity contracts. As Mr. Justice Brennan observed in the concurring opinion:

---

[58] The State Attorney General's failure to act in the present situation, in contrast with his vigorous prosecution of People v. Cadplaz Sponsors, Inc., 69 Misc. 2d 417, 330 N.Y.S.2d 430 (Sup. Ct. 1972), a case involving virtually identical facts, strongly suggests that the congressional reasoning is no less compelling today.

> "Concurrent regulation . . . was contemplated by the Acts as a quite generally prevailing matter. Nor is it rational to assume that Congress thought that *any* business whatsoever regulated by a specific class of officials . . . would be for that reason so perfectly conducted and regulated that all the protections of the Federal Acts would be unnecessary." *Id.* at 647 (emphasis in original).

The concurring opinion concludes with an especially apt passage:

> "Congress regulates by general statutes. The passage of a federal regulatory statute is a delicate balancing of many national legislative interests and political forces. Congress need not go through the initial travail of a reenacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage. If there is deemed wise any adjustment of the regulatory scheme, Congress may make it." *Id.* at 657.

Even defendants do not claim that Congress has in any way "adjusted" the federal securities laws to *exclude* cooperative housing stock.

Nor can any such Congressional intention be inferred from a fair reading of the several "housing" statutes cited by defendants (UHF Brief p. 42 *et seq.*). The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720, deals, not with securities, but with the interstate sale or lease of certain undeveloped *land*. To have placed supervisory authority over land in the SEC rather than HUD would necessarily have involved an enlargement of the

SEC's jurisdiction,[87] for under ordinary circumstances land *per se* is not a security. Significantly, those real-estate related instruments which are commonly regarded as securities, namely, "evidences of indebtedness secured by a mortgage or deed of trust on real estate" and "securities issued by a real estate investment trust," are expressly exempted from the statute. 15 U.S.C. §1702(5)-(6).

Equally unrelated to the purchase and sale of securities is the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533 (Dec. 22, 1974). As the title suggests, this statute deals solely with the "closing" of federally-related mortgage transactions. It is intended "to help persons borrowing money . . . better to understand the nature and costs of real estate settlement services." *Id.* §5(a). Such services are stated to include "title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, and the handling of the processing, and closing or settlement." *Id.* §3(3). The difference between a property survey, title policy, or an attorney's bill for services, and a public offering of shares of stock, scarcely needs belaboring.

---

[87] The Department of Commerce quotation at page 44 of the UHF Brief is misleading in several respects. Although not disclosed, it is taken from the Senate *Minority* Report. Further, it applies to the 1966 bill, which the Commerce Department, like the Department of Justice and the Post Office Department, opposed *in toto*, not on the ground that the SEC was proposed as the supervisory authority, but on the ground that no federal legislation was necessary. S. Rep. No. 1123, 90th Cong., 2d Sess. 198 (1968). In 1967, "the Federal Agencies reversed their oppositions and supported the legislation." *Id.*

As for Section 821 of the Housing and Urban Development Act of 1974, 42 U.S.C. §3532 (*see* UHF Brief pp. 42-43), we would note that, contrary to defendants' contention, Congress has not "thereby indicated that housing cooperatives should be federally regulated, if at all, by housing laws administered by HUD." *Id.* p. 42. Indeed, in introducing this legislation, Representative Rosenthal was severely critical of HUD.[58] Moreover, he was at pains to clarify the limited purpose of the statute:

> "I want to make it clear that the amendment requires a study only—it does not add to or change in any way laws affecting landlord-tenant relations or condominium or cooperative construction, sales, or ownership." 120 Cong. Rec. 5371 (daily ed. June 20, 1974).

As those laws now stand, a public offering of shares in a cooperative housing corporation is within the ambit of the antifraud provisions of the federal securities laws. Neither theoretically nor practically is there or need there be any conflict between federal housing legislation and securities law jurisdiction. Nor would a finding of securities law jurisdiction upset the federal-state balance. The fact is, such a finding would implement the congressional purpose and preserve precisely the regulatory relationship envisioned by Congress.

---

[58] Representative Rosenthal commented: "HUD has done virtually nothing to come to grips with the human and public-policy implications posed by the condominium boom. So far as I have been able to discover, those HUD 'consumer' information publications that do deal with the subject merely describe the nature of condominium ownership, or promote its alleged advantages. Nowhere are questions addressed relating to the shortcomings of such ownership or its negative impact on renters. 120 Cong. Rec. 5372 (daily ed. June 20, 1974).

POINT II

The defense of immunity under the Eleventh Amendment is not available to the Agency and has been waived by the State.

A. The Agency cannot assert the defense of Eleventh Amendment immunity.

The Agency has raised the affirmative defense that the District Court lacks jurisdiction over the person of the Agency because of the Eleventh Amendment to the United States Constitution.[59] That Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Thus, by its specific terms, the immunity conferred is limited to "one of the United States." The Agency is neither a State, nor its *alter ego*, and therefore does not come within the ambit of the Eleventh Amendment.

The Agency is neither a department nor a division of the State. It is a "public benefit corporation" with the power "to sue and be sued." Private Housing Finance Law §44. It is a separate "legal public entity." [1972] Op. N.Y. Att'y Gen. No. 56-B. By statute, the State is not liable

---

[59] Except insofar as it attacks the construction that the Second Circuit placed upon Section 32(5) of the Private Housing Finance Law (N.Y. Brief p. 12), the New York brief does not distinguish between State and Agency for purposes of the immunity defense. With respect to the Agency, the question of waiver need never be reached. Accordingly, discussion of that question is deferred to Point II, subdivision B of this brief, dealing with the State.

for the Agency's notes or bonds, which are not debts of the State.[60] Private Housing Finance Law §46(8).

It has been repeatedly held, by federal and New York courts alike, that substantially similar governmental entities do not have immunity under the Eleventh Amendment. *See Matherson* v. *Long Island State Park Commission,* 442 F.2d 566 (2d Cir. 1971); *International Longshoremen's Association* v. *North Carolina State Ports Authority,* 370 F. Supp. 33 (E.D.N.C. 1974); *Prendergast* v. *Long Island State Park Commission,* 330 F. Supp. 438 (E.D.N.Y. 1970); *Zeidner* v. *Wulforst,* 197 F. Supp. 23 (E.D.N.Y. 1961); *New York Dormitory Authority* v. *Span Electric Corp.,* 18 N.Y.2d 114, 271 N.Y.S.2d 983 (1966); *Story House Corp.* v. *New York Job Development Authority,* 37 App. Div. 2d 345, 325 N.Y.S.2d 659 (3d Dep't 1971), *aff'd mem.,* 31 N.Y.2d 942, 340 N.Y.S.2d 929 (1972); *Braun* v. *State,* 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952); *Ciulla* v. *State,* 191 Misc. 528, 77 N.Y.S.2d 545 (Ct. Cl. 1948).

Whitten v. *State University Construction Fund,* 493 F.2d 177 (1st Cir. 1974); *Charles Simkin & Sons, Inc.* v. *State University Construction Funds,* 352 F. Supp. 177 (S.D. N.Y.), *aff'd mem.,* 486 F.2d 1393 (2d Cir. 1973) and *State*

[60] The New York Brief is less than candid when it states:

> "[If] the purpose of this litigation is to impose any liability upon the Agency, that liability may be borne ultimately by the State itself, regardless of any prior statutory commitments or prohibitions." N.Y. Brief p. 12.

The fact is, the State has carefully insulated itself from any legal liability for the debts of the Agency or for its notes or bonds. If, by the mere expedient of a voluntary contribution to a separate "legal public entity" a State can confer immunity under the Eleventh Amendment, then every city, town, village and school district which receives State aid could claim immunity. This is certainly not the case.

University of New York v. *Syracuse University,* 206 Misc. 1003, 137 N.Y.S.2d 916 (Sup. Ct.), *aff'd,* 285 App. Div. 59, 135 N.Y.S.2d 539 (3d Dep't 1954) are all distinguishable.[61] The two entities involved in those cases, the State University Construction Fund and the University of the State of New York, unlike the Agency, are not fiscally independent but totally dependent upon the State for all their funds. A judgment against either would be, in effect, a judgment against the State itself. A judgment against the Agency, on the other hand, would not be enforceable against the State.

Neither the language of the Constitution itself nor the cases support any claim of immunity on the part of the Agency.

B. The defense of Eleventh Amendment immunity has been waived by the State both by statute and by conduct.

1. *The defense has been waived by statute*

To the extent that the Eleventh Amendment defense may be applicable to the State, it has been expressly waived by statute. Section 32(5) of the Private Housing Finance Law unequivocally provides:

> "With regard to duties and liabilities arising out of this article[62] the state, the commissioner or the supervising agency may be sued in the same manner as a private person."

[61] *See* N.Y. Brief p. 18. The latter two cases are not cited in the New York Brief. However, we call them to the Court's attention.

[62] At page 3 of its petition, the State concedes that "this article" comprises the entire Mitchell-Lama Act.

The word "liability" is a term "of the most comprehensive significance, 'ncluding almost every character of hazard or responsibility, absolute, contingent, or likely." Black's Law Dictionary 1059 (rev. 4th ed. 1968). *See also Mayfield* v. *First National Bank*, 137 F.2d 1013, 1019 (6th Cir. 1943).

As indicated above, the supervisory duties of the State through the Commissioner with respect to cooperative housing constructed and sold under "this article" are all-pervasive. The Commissioner is, *inter alia*, charged with responsibility to see that Riverbay complies "with law."[63] Private Housing Finance Law §32(1). Thus, if Riverbay's stock were sold in violation of the antifraud provisions of the federal securities laws, then the State failed to carry out its duty under "this article" and could "be sued in the same manner as a private person."

Waivers of immunity by a state couched in similar and even less comprehensive language than that employed in Section 32(5) of the Private Housing Finance Law have been construed as a consent to suit in the federal court. *See, e.g., Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) (authority "to sue and be sued in its own name"); *Flores* v. *Norton & Ramsey Lines., Inc.*, 352 F. Supp. 150 (W.D. Tex. 1972) ("[e]ach unit of government in the state shall be liable for money damages . . . where such unit of government, if *a private person*, would be liable to the claimant in accordance with the law of this State") (emphasis added); *Vincent* v. *P. R. Matthews Co.*, 126 F. Supp. 102 (N.D.N.Y. 1954) ("a public improvement [lien]

[63] "Law," as employed in other statutes, has been interpreted by the New York courts to mean "laws of the land." Kent v. Quicksilver Mining Co., 78 N.Y. 159, 182 (1879); Raub v. Gerkin, 127 App. Div. 42, 44, 111 N.Y.S. 319, 320 (2d Dep't 1908).

may be enforced against the funds of the state . . . in the same court and in the same manner as a mechanics lien on real property").[64]

In the footnote on page 12 of its brief, the State describes Section 32(5) as a "suability provision." In effect the State thus concedes that Section 32(5) is a waiver of Eleventh Amendment immunity. This phrase can have no other meaning because the only immunity from suit which the "commissioner" and "supervising agency"[65] ever enjoyed was in their official capacities as agents of the State. *See* cases cited at p. 66, *supra*. It follows that the language of the statute must be read as a waiver of that immunity.

The State also contends that Section 32(5) should be construed only as a waiver to suit in the state courts and not as including suits in the federal courts (N.Y. Brief p. 13), a distinction which finds no support in the language employed. The New York Legislature has frequently provided for limited waivers of sovereign immunity, in each instance employing entirely different language to indicate its intention to waive immunity only in the state courts.[66]

[64] The statute involved in Knight v. New York, 443 F.2d 415 (2d Cir. 1971), cited at pages 11, 12 and 18 of the New York brief, was N.Y. Real Prop. Actions Law §1541 (McKinney 1963), which provides only that "an action may be maintained . . . by or against the people of the State of New York," a provision totally different from Section 32(5).

[65] The Agency is correct in its contention that it is not a "supervising agency" within the meaning of Section 32(5) (N.Y. Brief p. 12). However, the argument based on this contention is immaterial. As explained in the first subdivision of this point, the Agency has no immunity to waive.

[66] *See, e.g.*, N.Y. Aband. Prop. Law §215 (McKinney Supp. 1974) ("[s]uch party . . . may certify such facts to the court of claims"); N.Y. Agric. & Mkts. Law §27(13) (McKinney 1972)

So far as plaintiffs can ascertain from a reading of reported decisions involving statutory waiver of Eleventh Amendment immunity, there is no provision in the laws of any other State whose language is similar to Section 32(5).[67] Consequently, to affirm the holding of the Second Circuit on the basis of statutory waiver would not appear to have any effect upon any other State. Even as to New York, the effect would be extremely limited.

2. *The defense has been waived by conduct*

Both New York and Ohio concede that States may waive their immunity under the Eleventh Amendment by conduct and that Congress may require "States to waive this immunity as a condition of participating in activities regulated by the federal government," citing *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S.

("[t]he owner . . . may present to the court of claims a claim"); N.Y. Canal Law §§40(14), 85 and 120 (McKinney Supp. 1974) §40(14)—[t]he owner . . . may present to the court of claims a claim"; §85—[e]ach person . . . may present a claim for damages against the state to the court of claims"; §120—damages to be ascertained and determined . . . before the court of claims"); N.Y. Correc. Law §27(13) (McKinney 1968) ("[t]he owner . . . may present to the court of claims a claim"); N.Y. Educ. Law §307(13) (McKinney 1969) ("[t]he owner . . . may present to the court of claims a claim"); N.Y. Environmental Conservation Law, §§15-1717(4), 15-1739(6) (McKinney 1973) (§15-1717(4)—"the licensee may recover the balance in the Court of Claims'" §15-1739(6)—"the damages may be in like manner recovered in the Court of Claims"); N.Y. H'way Law §29(14) (McKinney 1962) ("[a]ny owner may present to the court of claims a claim"); N.Y. Mental Hygiene Law §71.33 (McKinney Supp. 1974) ([t]he owner . . . may present to the court of claims a claim"); N.Y. State Law §59-b (McKinney 1952) ("the court of claims shall have jurisdiction to determine the amount of such compensation").

[67] Ohio's failure to address the express waiver question suggests that its laws contain no similar provision. *See* Ohio Brief, p. 2.

184 (1964) (Ohio Brief p. 6; N.Y. Brief p. 5).[68] In *Edelman* v. *Jordan*, 415 U.S. 615, 678 (1974), this Court stated that the issue:

> "[t]urns on whether Congress has intended to abrogate the immunity in question, and whether the State, by its participation in the program authorized by Congress, had in effect consented to the abrogation of that immunity."[69]

Thus, in the first instance, the question becomes one of determining Congress' intent from the legislative history and the statutory scheme.

With respect to this question, the statutory definition of two terms is relevant: (1) the definition of "person" in Section 2(2) of the 1933 Act, 15 U.S.C. §77b(2), and Section 3(a)(9) of the 1934 Act, 15 U.S.C. §78c(a)(9), and (2) the definition of "security" in Section 2(1) of the 1933 Act, 15 U.S.C. §77b(1) and Section 3(a)(10) of the 1934 Act, 15 U.S.C. §78c(a)(10). There can be no doubt that Congress meant to include States within the definition of "persons." In H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933), Congress declared:

[68] It should be noted that Ohio's entire brief is directed at a straw man. Ohio's contention that the Second Circuit "required States to waive their Eleventh Amendment immunity as a condition of concurrently regulating the issuance and sale of securities" (Ohio Brief pp. 3, 10, 12-14) is completely in error. The Second Circuit did not so hold, and plaintiffs make no such contention. The Second Circuit did correctly hold, however, that in adopting the 1934 Act, Congress required States to waive their Eleventh Amendment immunity as a condition of engaging in the "sale and distribution of securities" (P-A22).

[69] Both New York and Ohio adopt this test (N.Y. Brief pp. 6-7, Ohio Brief pp. 6, 9).

> "Paragraph (2) [of the 1933 Act] defines 'person' in terms sufficiently broad to include within that concept not only an individual but also every form of commercial organization that may issue securities. *It includes within the concept of a 'person' a government or a political subdivision thereof,* although later sections of the bill exempt from its provisions securities issued by the U.S., a State or a territory, or a political subdivision of any of these governmental units." (emphasis added).

See also Id. at 14; Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 298, 720-21, 753 (1934); Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. 6903, 7038, 7446 (1934).

During the extensive hearings on both statutes, concern was expressed that the classification of States, municipalities and political subdivisions as "persons" would subject their securities to the registration requirements, thereby impairing the value and marketability of state, municipal and quasi-governmental bonds. *See* Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 298, 720-721, 753 (1934); Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. 6903, 7038, 7446 (1934). Congress did *not* respond by changing the definition of "person," but rather by amending the definition of "exempted security" to encompass "securities which are direct obligations of or obligations guaranteed as to principal or interest by a State or

any political subdivision thereof." 1934 Act §3(a)(12), 15 U.S.C. §78c(a)(12); *cf.* 1933 Act §3(a)(2), 15 U.S.C. §77(a)(2). *See* Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. 7543-44 (1934); Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933); Hearings on S. 875 Before the Senate Committee on Banking & Currency, 73d Cong., 1st Sess. 65-66, 232-33 (1933). Obviously, Riverbay's stock does not qualify as an exempted security; it is neither the direct obligation of a State nor guaranteed by a State. In any event, the exemption is only from registration. Insofar as the definition of "person" remains unaltered, a State and its political subdivisions remain subject to the antifraud provisions of the federal securities laws. The only reported decision in point so holds. *Baron* v. *Shields*, 131 F. Supp. 370 (S.D.N.Y. 1955).

The very question here involved was determined in *Parden* v. *Terminal Railway of Alabama Docks Department,* 377 U.S. 184 (1964). In that case, citizens of Alabama brought a personal injury action pursuant to the Federal Employers Liability Act, 45 U.S.C. §§51 *et seq.*, against a railroad owned and operated by the State of Alabama. The courts below dismissed on the ground that under the Eleventh Amendment, Alabama was immune from suit. This Court reversed and in a rationale wholly applicable to the present case stated:

> "Our conclusion is simply that Alabama when it began operation of an interstate railroad approximately 20 years after the enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the

States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit."

• • •

"A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 192, 196.[70]

---

[70] *See also* Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 625 (3d Cir. 1971) (participation in federal-state highway program) (dictum); Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013, 1028 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972) (participation in federal-state highway program); Chesapeake Bay Bridge & Tunnel District v. Lauritzen, 404 F.2d 1001, 1003-04 (4th Cir. 1968) (occupation of navigable waters with bridge and tunnel); Owens v. Roberts, 377 F. Supp. 45, 56 (M.D. Fla. 1974) (participation in federal-state welfare program); Lemelson v. Ampex Corp., 372 F. Supp. 708, 712 (E.D. Ill. 1974) (purchase of patented machinery incorporating infringing devices); International Longshoremen's Association v. North Carolina State Ports Authority, 370 F. Supp. 33, 38 (E.D.N.C. 1974) (operation of interstate railroad); Principe Compania Naviera, S.A. v. Board of Commissioners, 333 F. Supp. 353, 356 (E.D. La. 1971) (operation of maritime facilities); Rivet v. East Point Maritime Corp., 325 F. Supp. 1265, 1267 (S.D. Ala. 1971) (stevedoring operations).

The facts in the instant case are even more compelling than those in *Parden*. There, the legislative history of the FELA was silent as to the inclusion of States within the statutory scheme.[71] Here, Congress explicitly intended to include States. Further, *Parden* involved a statute conferring concurrent state and federal jurisdiction (*see* 45 U.S.C. §56) so that it was possible to deny access to a federal forum without depriving private suitors of a remedy against States. Here, a denial of access to the federal forum would effectively foreclose all relief under the 1934 Act because jurisdiction is vested exclusively in the federal courts.[72]

The federal securities laws were enacted in 1933 and 1934. As the State itself concedes, "Not until 1955, with the enactment of . . . the Mitchell-Lama Law, did New York authorize the form of housing company involved in this litigation." N.Y. Brief p. 16. Thus, when the State enacted the Mitchell-Lama Act in 1955, more than twenty years after enactment of the federal securities laws, it actively embarked upon the interstate solicitation of risk capital through the sale of cooperative housing stock with clear knowledge of the existing federal regulatory scheme.

---

[71] This point was the basis of the dissenting opinion. 377 U.S. 198-200.

[72] Indeed, if this Court were to accept the arguments advanced by New York and Ohio, that there is no private right of action under Section 17(a) of the 1933 Act (Ohio Brief p. 7; N.Y. Brief p. 6), *all* relief under the federal securities laws would be foreclosed. Of course, there is substantial authority opposed to defendants' position. *See, e.g.*, Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Mincola v. Arthur-Hardgrove Co., [1964-66 Transfer Binder] CCH Fed. Sec. L. Rep. ¶91,608 (S.D.N.Y. 1965); Pfeffer v. Cressaty, 233 F. Supp. 756 (S.D.N.Y. 1963); Thiele v. Shields, 131 F. Supp. 416 (S.D.N.Y. 1955); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949).

The State's historical discourse on its housing legislation from 1926 to the present (N.Y. Brief pp. 14-16) is beside the point. There was no housing statute prior to the Mitchell-Lama Act in 1955 which was keyed to a statutory plan for raising risk capital by the public solicitation of subscriptions for the common stock of the housing company. The original State Housing Law, N.Y. Laws, 1926, ch. 823, established an entirely different statutory plan. That plan was designed to encourage private investors to form so-called limited dividend housing companies which would undertake residential housing projects subject to the regulation of a newly created State Board of Housing. *See Id.* §30(2). The apartments constructed or acquired by such housing companies were to be *rented, not sold,* to the occupants. *See Id.* §§16, 21, 38(8) and 42.

The State's historical discourse in no way alters the fundamental rule that voluntary entry into a federally regulated sphere must be construed as a waiver by conduct of Eleventh Amendment immunity. *Parden* v. *Terminal Railway of Alabama Docks Department,* 377 U.S. 184 (1964). Nor, despite the contentions of New York and Ohio, is that rule in any way vitiated by this Court's decisions in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), and *Employees* v. *Missouri Public Health Department,* 411 U.S. 279 (1973), both of which cases cited *Parden* with approval. Both *Edelman* and *Employees* are entirely distinguishable on the facts.

First, in this case there is a clear, unequivocal statutory waiver by the State; in *Edelman* and *Employees* there was none.

Second, unlike *Edelman* and *Employees,* in the instant case the State is not carrying out a purely governmental

function. Contrary to New York's contention, it is not merely regulating securities issued by others. The sale of cooperative stock to the public is a *sine qua non* of the Mitchell-Lama Act. Private Housing Finance Law §§22(2), 25 and 26(1)(b). The initial risk capital *must* come from the stockholders. The State also derives millions of dollars in revenue from supervision fees; $3,510,000 in this case alone. Fees of this dimension are hardly comparable to the nominal filing fees which customarily accompany blue sky registrations. Clearly, the State has acted in a proprietary and not in a governmental role[73] in the present case.

Third, unlike the statute in *Edelman,* where this Court found that the Social Security Act did not create a private cause of action, or in *Employees,* where there was concurrent jurisdiction in the State courts, Congress, in enacting the 1934 Act, specifically and affirmatively placed exclusive jurisdiction for violations thereof in the federal courts, thereby indicating its determination to condition a State's future activities in the areas circumscribed by the Act

---

[73] *Cf.* International Longshoremen's Association v. North Carolina State Ports Authority, 370 F. Supp. 33 (E.D.N.C. 1974).

MacKethan v. Virginia, 370 F. Supp. 1 (E.D. Va.), *aff'd per curiam,* Civ. No. 74-1249 (4th Cir. Dec. 23, 1974), and the unreported decisions, Matthews v. Fisher, No. C-1-74-284 (S.D. Ohio, April 16, 1974), *appeal docketed sub nom.* Yeomans v. Kentucky Department of Banking and Securities, No. 74-2003 (6th Cir., September 4, 1974), and DeVoe v. Ostrander, No. C-3-74-95 (S.D. Ohio, October 18, 1974), cited at pages 10 and 18 of the New York Brief as evidencing a contrary view, are both poorly reasoned and distinguishable on their facts. In all of those cases, the district courts distinguished *Parden* without giving any consideration to the legislative history showing Congress' expressed intent to include States as "persons" within both the 1933 Act and the 1934 Act. Further, in those cases, the State's role was purely regulatory in the traditional sense.

upon a waiver of Eleventh Amendment immunity. 1934 Act §27, 15 U.S.C. §78aa.[74]

Fourth, the statutes involved in *Edelman* and *Employees* do not involve the same policy considerations as underlie the federal securities laws. We are dealing here with two statutes whose salutary remedial purposes have been consistently upheld and extolled by this Court. Those purposes can only be frustrated by permitting a State to defraud its citizens under the cloak of Eleventh Amendment immunity.

In the final analysis, defendants' briefs support rather than refute both the legal and equitable bases for federal jurisdiction. Defendants have sold 1,312,128 shares of common stock to 15,372 purchasers. They have received a cash down-payment of $32,803,200. They have saddled plaintiffs with a $375,755,710 mortgage debt. They have sold the stock on the basis of fraudulent information bulletins to the people who most require the protection of the federal securities laws, people of limited means. There should be no exception engrafted upon the relevant statutes for state-sanctioned fraud.

---

[74] *Edelman* involved a conflict between State and federal regulations, the latter having been promulgated while the former were in effect. The State could hardly have anticipated that its actions in administering its regulations might serve, subsequently and retroactively, as the basis of liability because of some implied cause of action. But here there can be no claim that New York was not on actual notice that its actions would result in a waiver of immunity. By the time the State enacted the Mitchell-Lama Act in 1955, and voluntarily went into the business of promoting the public sale of cooperative stock, there was no doubt in anyone's mind that a private party could bring an action under the 1934 Act. Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953). Indeed, the United States District Court in Baron v. Shields, 131 F. Supp. 370 (S.D. N.Y. 1955), had already held that a state was amenable to suit under Section 10(b) of that Act. In view of these facts, New York and Ohio's implied-cause-of-action argument is not applicable.

CONCLUSION

The antifraud provisions of the federal securities laws were never intended to protect only those who speculate for profit, while leaving exposed those who have invested their entire savings in what is probably the one important stock purchase of their lives—not for speculative gain, but for economic necessity. Over the forty year history of these laws, this Court has steadfastly refused to permit any erosion of their protection of innocent purchasers. In this tradition, the decision of the Court of Appeals should be affirmed.

Dated: New York, New York
April 4, 1975

Respectfully submitted,

LOUIS NIZER
40 West 57th Street
New York, New York 10019
Attorney for Respondents

GEORGE BERGER
JAY F. GORDON
IRA B. ROSE
JANET P. KANE
THOMAS G. JACKSON
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1974

FILED
APR 17 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS UNITED HOUSING FOUNDATION, INC., *et al.*

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
(212) 644-8602

Attorney for Petitioners
United Housing Foundation, Inc., et al.

MARTIN LONDON
GEORGE P. FELLEMAN
MARSHALL BEIL
CAROL GOODMAN
ALAN G. BLUMBERG
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Respondents' Statement of Facts	3
Argument	
A. This Court Has Consistently Rejected the "Literal Approach" to Statutory Construction	10
B. The Blue Sky Laws Are Irrelevant	13
C. Respondents Have Misapplied the *Howey* Profit Test	15
D. The "Risk Capital" Approach Advanced by Respondents Would Stretch the Securities Laws Far Beyond What Congress Intended	17
E. Respondents' Investment Contract Theory Conflicts with Current SEC Regulations	19
Conclusion	21

TABLE OF AUTHORITIES

PAGE

Cases:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 12

Brothers v. McMahon, 351 Ill. App. 321, 115 N.E.2d 116 (1953) 13

Davenport v. United States, 260 F.2d 591 (9th Cir. 1958), *cert. denied,* 359 U.S. 909 (1959) 16

El Khadem v. Equity Securities Corp., 494 F.2d 1224 (9th Cir.), *cert. denied,* —— U.S. —— (1974) 18

Forman v. Community Services, Inc., 366 F.Supp. 1117 (S.D.N.Y. 1973), *rev'd,* 500 F.2d 1246 (2d Cir. 1974) ..... *passim*

Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974) ..... *passim*

Levine v. Seilon, 439 F.2d 328 (2d Cir. 1971) 7

Murphy v. Dare to Be Great, 3 Blue Sky L. Rep. ¶71,053 (D.C. Super. Ct. 1972) 18

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 11, 12, 20

SEC v. W. J. Howey Co., 328 U.S. 293 (1946) 15, 17, 20

Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906 (1961) 18

State *ex rel* Troy v. Lumbermen's Clinic, 186 Wash. 384, 58 P.2d 872 (1936) 16

State v. Silberberg, 166 Ohio St. 101, 139 N.E.2d 342 (1956) 13

PAGE

Tcherepnin v. Knight, 389 U.S. 332 (1967) 11

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534 (1940) 11–12

Venture Investment Co., Inc. v. Schaefer, 3 Blue Sky L. Rep. ¶71,031 (D. Col. 1972), *aff'd* 478 F.2d 156 (10th Cir. 1973) 17

Statutes and Rules:

Federal:

Internal Revenue Code
- Section 121(d)(3) 21
- Section 1034(f) 21

Tax Reduction Act of 1975, P.L. 94-12, Mar. 29, 1975,
- Section 208 21

State:

N.Y. Gen. Bus. L. §352 14
N.Y. Gen. Bus. L. §352-e 14–15
N.Y. Laws 1974, ch. 732, §2 6
N.Y. Private Housing Finance Law
- Section 28 9
- Section 31(9) 6
- Section 33 5
- Section 34 19
- Section 35 9
- Section 36 9
- Section 94 19
- Section 95 19

N.Y. Real Prop. L. §339-ee 15
N.Y. Tax L. §209(4) 6

PAGE

Legislative Material and Bills:

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 13
N.Y. Bill, S. 4508A (1975-76 Reg. Sess.) 6
S.Rep. No. 47, 73d Cong., 1st Sess. (1933) 13

SEC Release:

SEC Securities Act Release No. 5347 (Jan. 4, 1973) 19–21

Articles:

Berman and Stone, Federal Securities Laws and the Sale of Condominiums, Homes and Homesites, 30 Bus. Lawyer 411 (1975) 20
Coffey, The Economic Realities of a Security: Is There a More Meaningful Formula?, 18 W. Res. L. Rev. 367 (1967) 14
Dickey and Thorpe, Federal Security Regulation of Condominium Offerings, 19 N.Y.L. Forum 473 (1974) 14
1 Loss, Securities Regulation (1961) 14
Miller, Cooperative Apartments: Real Estate or Securities?, 45 Boston U. L. Rev. 465 (1965) 14

IN THE

Supreme Court of the United States

October Term, 1974

Nos. 74-157 and 74-647

UNITED HOUSING FOUNDATION, INC., *et al.*,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents,

and

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

v.

MILTON FORMAN, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS UNITED HOUSING FOUNDATION, INC., *et al.*

Preliminary Statement

This case involves cooperative memberships in a state-subsidized and regulated non-profit middle income housing development. The issue before this Court is whether these memberships are securities under federal law. The case has come to this Court on petitioners' threshold motions to

dismiss the complaint for lack of federal subject matter jurisdiction. The merits of respondents' claims have not been litigated by the parties and both Courts below expressly disclaimed any inferences with respect to the merits (P-A 8 and n. 4, P-A 22; P-B 12 n. 28).

Nevertheless, the respondents devote more than one-third of their brief to a detailed description of the alleged merits of their case. That description distorts the record, and is filled with hyperbole, misstated facts and scurrilous charges. Prefacing their "facts" with the statement "that there can be no dispute as to the facts" (Resp. Br. 4), respondents spin a tale about how officials of the State of New York and its Housing Agency, as well as the United Housing Foundation and its officers, engaged in a massive swindle designed to bilk widows and orphans out of their life savings. According to respondents, petitioners financed and built the nation's largest middle income cooperative not to provide decent housing for New York's middle income citizens but to line their own pockets with supervisory, financing and legal fees. Respondents even charge, for the first time in this case, that their facts support the inference that unnamed "defendants" received bribes. That kind of baseless allegation characterizes respondents' totally irresponsible presentation of this case.*

In spite of the smokescreen raised by respondents, the issue in this case remains well defined; the state subsidized and regulated non-profit cooperative residences purchased by respondents, which cannot be resold at a profit, are not

* The "Argument" section of the respondents' brief is likewise replete with mis-cited cases and misleading case analysis. *See e.g.*, pp. 10 to 13, *infra*.

securities and should not be subjected to federal laws designed to regulate conduct in the investment marketplace. No amount of distortion or hyperbole can change the fact that respondents purchased homes, not investment stock. No amount of irresponsible charges can change the fact that the State and nonprofit sponsors of Co-op City built and sold low cost housing, not profit-making investment contracts. And no amount of exaggeration can change the fact that the federal securities laws were neither designed nor intended to regulate such a public welfare undertaking.

Respondents' Statement of Facts

Although respondents' distorted description of the merits of their case is irrelevant to the jurisdictional issue before this Court, we cannot leave their baseless claims and record distortions wholly unanswered. We will, therefore, briefly respond to some of respondents' more egregious errors.

1. *The Information Bulletins Did Not "Guarantee" that Increases in Construction Costs Would Not Be Passed on to Respondents* (Resp. Br. 12). Respondents' claim is that they are paying carrying charges in excess of those originally estimated. That is so. The construction price and mortgage increased substantially between 1965 and 1971, and the carrying charges now being paid by cooperative members are higher than those originally estimated in 1965, before construction began. But respondents have grossly distorted the record in maintaining that the early estimates were somehow "guaranteed." Thus, despite their several references to the Information Bulletins, respondents conveniently fail to mention that every Informa-

tion Bulletin distributed by the petitioners repeatedly warned that all contracts and costs were subject to change with the approval of the State through the Commissioner of Housing* and that the plans and specifications were subject to change (167a, 169a, 174a, 175a, 188a, 190a, 194a, 195a). Moreover, even the language quoted by the respondents (Resp. Br. 11) expressly warns that the contract price is subject to addition or deduction for changes made during the progress of construction.

Respondents also fail to mention that as Co-op City's projected carrying charges increased, all subscribers were immediately advised in revised Information Bulletins and in other notices. This information was distributed long in advance of the effective dates of the increases so that people who could not afford them would not undertake them.**

Respondents also fail to note that all cooperative members were always free to rescind their purchases and to receive refunds for their purchase prices. Indeed, between 1965 and 1973, approximately 15,000 subscribers withdrew

* *E.g.*, "All contracts and agreements referred to herein and all project costs are subject to review, audit and final approval by the Commissioner of Housing and Community Renewal . . ., and to such changes as the Commissioner may require or approve" (167a).

** Thus, the prospect of increased carrying charges in 1970 was announced in 1968 (75a, 77a, 101-03a). Respondents acknowledge the 1968 notice in a misleading footnote (Resp. Br. 19 n. 18), but fail to mention that the letter was issued before any Co-op City apartments were even occupied. Ironically, respondents have the gall to assert that this letter "is irrelevant in determining whether Riverbay stock is a security," and see no irrelevancy in the extensive charges of fraud that they reiterate at length. And the 1973 and 1974 increases were announced in 1971 (Affidavit of Martin London sworn to December 19, 1972, ¶11, annexed to Notice of Motion to prohibit plaintiffs' attorney from engaging in unsupervised communications with the class, dated December 19, 1972), at a time when approximately 1/3 of Co-op City's apartments had not yet been occupied (*cf.* 394a).

their memberships and received refunds in full (393a). Several of the named plaintiffs in this action, including Milton and Ellen Forman, have moved out of Co-op City and received full refunds of their purchase prices.*

Respondents skirt lightly around the fact that a large portion of the carrying charge increases complained of was in no way attributable to increases in construction costs. Belatedly, in a footnote, they acknowledge that "[s]ome portion of the latest increases may be attributable to increased costs of operation and maintenance" (Resp. Br. 22 n. 23).

2. *Co-op City Housing Is Subsidized.* Respondents argue that Co-op City housing is not subsidized (Resp. Br. 6 n. 4). Such a claim is patently false.** Pursuant to Section 33 of the Private Housing Finance Law ("Housing Law"), Co-op City receives exemptions from real estate taxes under a formula which reduces those taxes to approximately 20% of what would otherwise be payable. This subsidy amounts to approximately $18 per room per month. Likewise, the mortgage loan made by the New York State Housing Finance Agency is for a term of 40 years, and the average annual debt service rate paid by

* With respect to Co-op City's members, respondents continually refer to them as very young or very old, on fixed incomes, having given up rent-controlled housing and as having invested their life savings in Co-op City (*e.g.*, Resp. Br. 6, 22, 27). That characterization of the Co-op City resident is fantasy. The fact is that the record is silent on the ages of Co-op City's members, where they formerly lived and how much of their "life savings" were invested in their Co-op homes. It should also be noted that not one person has ever lost a penny of his investment in a Co-op City membership.

** Both courts below had no difficulty in recognizing Co-op City as "subsidized" housing (P-A 4-5 and n. 2; P-B 7).

Co-op City amounts to 6.865% (360a). These below-market mortgage costs save Co-op City residents at least $8.50 per room per month.* And Co-op City is exempt from annual New York State and New York City corporate franchise taxes. N.Y. Tax L. §209(4); N.Y. Laws 1974, ch. 732, §2. These subsidies save Co-op City approximately $245,000 per year.**

In addition to these substantial subsidies, which have the effect of reducing Co-op City's carrying charges to nearly one-half of what they would otherwise be, some residents of Co-op City are eligible for further subsidies pursuant to Section 31(9) of the Housing Law. These subsidies, available to those over 62 years of age whose probable after-tax income does not exceed $5,000 per annum, reduce the carrying charges to one-third of the resident's income.

3. *The Price of Co-op City Memberships Was $450 Per Room, Not $5,737 Per Room.* Respondents assert that the price of Co-op City membership is not $450 per room, the amount paid by every cooperative member, but $5,757 per room (Resp. Br. 24). That is not so. Respondents reached that figure by dividing the total construction cost by the number of rooms in the development. But that result is not the price paid for membership in the cooperative. The

* This projected saving is based on a comparison with the annual cost to Co-op City of a conventional 25 year, 7½ percent mortgage. Comparison with an 8% or 8½% mortgage would obviously result in a larger savings. Even more importantly, it is doubtful that a $390,000,000 mortgage could have been obtained at any cost from conventional mortgage lenders.

** A bill to provide further subsidies to residents of Co-op City and other similar cooperatives is now pending in the New York State Legislature. *See* S. 4508A (1975-76 Reg. Sess.). This bill would provide for substantial annual appropriations to offset mortgage interest charges.

total equity requirement for membership is, and always has been, $450 per room. Cp. 172-73a with 193a.*

4. *Petitioners Did Not Profit from the Construction of Co-op City.* Portraying the petitioners as seeking to advance their own financial interests, respondents describe "profit" allegedly realized by some of the petitioners (Resp. Br. 30-32) and thereby grossly mischaracterize the state-approved fees paid to those petitioners for services rendered in connection with the development.

For example, the fees paid to Community Services, Inc. —which acted as general contractor and sales agent during the eight-year period of construction of Co-op City—was, in fact, but a fraction of the amount customarily allowed by the State for developments under the Housing Law. Indeed, it is doubtful that CSI's costs were even covered by the fees it received. And the supervisory and financing fees paid to the State and the Agency were in strict ac-

* It is highly misleading, indeed, irresponsible, to include mortgage amortization (over a 40 year period in this case) as a part of the price of cooperative membership. No member paid or obligated himself to pay mortgage amortization for forty years. His only obligation is to pay monthly carrying charges in accordance with the terms of his lease.

With regard to the price of Co-op City shares, we should note that respondents do not claim that their memberships are worth any less today than they paid for them, and, of course, they are worth precisely what was paid for them. Instead, respondents seek to obtain the "benefit of the bargain" they claim petitioners promised. It is well-settled that such "contract" damages are not available under the securities laws. *See, e.g.*, Levine v. Seilon, 439 F.2d 328 (2d Cir. 1971). Recognizing this point, the Court of Appeals not only refrained from commenting on the substance of respondents' charges, but also refrained from indicating any conclusion as to whether their complaint even states "claims for which relief can be granted or whether any damages are cognizable . . ." (P-A 8).

cordance with regulations issued under legislative authorization. To suggest that those fees are designed to make the State and Agency a profit, rather than to cover their costs, is absurd. Likewise, the fees paid to the attorneys for their extensive legal work over a ten-year period can in no way be characterized as "profit." Moreover, there is no allegation that such fees are not reasonable compensation for legal services rendered.*

Perhaps the most irresponsible and malicious charge respondents advance is that "defendants" leased Co-op City commercial space at less than fair value "in consideration for extrinsic benefits" (Resp. Br. 32). That charge, made without a shred of record support and, indeed, never before even hinted in this litigation, unjustly impugns the integrity of a number of state officials as well as the individual petitioners and accurately reflects the unseemly lengths to which respondents will go to advance their cause.

5. *The Information Bulletins Did Not Promise Profits to the Members.* Respondents' claim that Co-op City's Information Bulletin promised them profits (Resp. Br. 25-27) is belied by the language of the Bulletins themselves. Far from promising financial profits, those Bulletins emphasize the social benefits which will accrue to cooperative members in a cooperative community (*e.g.*, 162-63a, 187a). Cash income, interest, dividends, or other forms of investment income were at no time used as inducements to membership in Co-op City.*

* It is astounding that respondents can even impliedly challenge this legal fee when they themselves raised nearly $150,000 for their attorney in this case before the complaint was even filed. *See* Opinion and Order with respect to communications between plaintiffs' attorney and the class, Pierce, J., March 7, 1973.

But respondents point to the fact that the Information Bulletin mentioned the possibility of rent rebates which, they suggest, is a form of "profit" (Resp. Br. 25-26). That is wrong. Such rebates, if paid, will simply represent a refund of that portion of the rent already paid by each member which exceeds his aliquot share of the cooperative's expenses. That is no more "profit" than a refund from the grocery store or telephone company. It is not even remotely akin to investment income like dividends on corporate stock or interest on bonds.**

* Indeed, as the District Court found:

> "[N]one of the documents involved in this transaction . . . ever once use material, tangible profits as an inducement. In fact, the Information Bulletins assert the contrary, impressing upon the potential purchaser the stability of environment to be achieved because the shares cannot be used for speculation. . . . Further, since these shares pay no dividends, contemplate no apportionment of any profits or assets or earnings of any kind, it is clear that the Co-op City residents did not purchase the shares with any expectation of profits, as the word is generally used in commerce" (P-B 21-22; footnotes omitted).

That finding was not disturbed by the Court of Appeals.

** Respondents also urge that Riverbay can pay dividends, citing Housing Law §28 (Resp. Br. 29, 50). But the Section 28 dividend provision is obviously intended to allow a 6% dividend for investors in rental housing: among other things, Section 28 provides that the 6% dividend accrues annually and that all accumulated past-due dividends must be paid. This is clearly inapplicable to a cooperative project. Respondents also claim that the Co-op City memberships entitle the members to share in assets on dissolution, *id.*, but neglect to mention that dissolution (a) requires that the $390,000,000 mortgage indebtedness be paid in full; (b) results in termination of all real estate tax exemption; and (c) cannot be accomplished until twenty years after the project was occupied unless the Commissioner of Housing consents. Housing Law §35(2), (3). It is inconceivable that the members of Co-op City would vote to dissolve or that they ever contemplated this option. *See also* Housing Law §36.

Respondents also argue that there exists the possibility of capital appreciation of their cooperative memberships, which they urge, might be sold at a profit (Resp. Br. 29-30). That is sheer nonsense. The Co-op City by-laws, and the Housing Law, absolutely forbid resale of cooperative memberships at a profit, even in a default sale. As to this, both the District Court and the Circuit Court were in full agreement.*

* * *

Although the list of "facts" which respondents maintain are "admitted" could go on and on, we shall not further belabor the record. Respondents made similar presentations below—both in the District Court and in the Court of Appeals—and both courts expressly disclaimed any inference or suggestion of an opinion with respect to the merits. The respondents' lengthy description of the alleged merits of their case is irrelevant. It is also distorted and misleading. Their efforts to smear the petitioners are irresponsible and have no place in briefs filed in any court.

ARGUMENT

A. This Court Has Consistently Rejected the "Literal Approach" to Statutory Construction.

Respondents rely upon several decisions of this Court in urging that the literal approach to statutory construction adopted by the Court of Appeals be affirmed. Without extended discussion, we respectfully submit that the cases principally relied upon by the respondents—*SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) and *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967)—contain no support for their literal approach. Indeed, as pointed out in our principal brief, those cases clearly reject respondents' form over substance arguments (UHF Br. 20-21, 24). This Court clearly enunciated the controlling standard in *Tcherepnin*:

> "[I]n searching for the meaning and scope of the word 'security' in the [1934] Act, form should be disregarded for substance and the emphasis should be on economic reality." 389 U.S. at 336.

Among many miscitations and distortions contained in respondents' brief, their one-sentence quotation from this Court's decision in *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (Resp. Br. 34) is particularly misleading. Far from advocating a literal approach to statutory construction, the full statement by Mr. Justice Reed makes it clear that he was saying exactly the opposite:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at

---

* The Court of Appeals stated, "Initially it must be conceded that there is no possible profit on a resale of the stock" (P-A 15-16). Moreover, the District Court noted, "The beneficial purposes of the Mitchell-Lama Act would be ill-served if a tenant . . . was to be free to transfer his stock . . . to the highest bidder or in other ways to manipulate his interest to produce a personal profit" (P-B 23 n. 38).

> variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Id.* at 543-44; footnotes omitted.*

Similarly, the numerous Court of Appeals decisions which reject the literal approach advocated by respondents and hold that not every "note" is a "security" cannot be dismissed with a passing comment in a footnote (Resp. Br. 40 n. 40). And, contrary to respondents' assertion in that footnote, none of the note cases cited by respondents involved "consumer credit transactions" or "personal loan[s]." All of the transactions involved loans for business use.**

* Examples of other liberties respondents have taken with this Court's decisions include their discussion of the decision in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). Respondents assert that this Court "held" the shares of stock in Ute to be securities (Resp. Br. 39). No such holding is to be found in that decision. Indeed, it does not appear that the issue was even raised. Moreover, the stock in that case was not even remotely like the cooperative memberships here; the stock in Ute represented interests which included valuable oil, gas and mineral rights (406 U.S. at 136). Indeed, because of the value of the underlying assets, those shares rapidly appreciated in market value after their issuance.

** Respondents' additional distinction of those cases based on language in Joiner that "this court held that the statutes [securities laws] would apply if the 'novel, uncommon or irregular devices . . . were widely offered'" (Resp. Br. 40 n. 40) is a particularly outrageous misuse of the language in that opinion. This Court actually held:

> "Novel, uncommon or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a security.'" 320 U.S. at 351.

This Court has, in short, never accepted the so-called literal approach to statutory construction, and it should not do so here. Co-op City is not an investment venture. Indeed, as the District Court appropriately noted, any possibility of investment or speculation would effectively destroy the salutary purposes of the Housing Law (P-B 22-23 and n. 38). A Co-op City resident purchases his membership solely for the right to live in an apartment which cannot be sold at a profit and which carries a below market rental made possible by substantial state and city subsidies. It is plainly a transaction remote from the world of investment and commerce which the securities laws were intended to regulate.

B. The Blue Sky Laws Are Irrelevant.

Respondents incorrectly argue that "[a]ll of the states active in cooperative housing treat cooperative stock as securities under their respective State blue sky laws," citing New York, California, Florida and Illinois (Resp. Br. 46). The same point was briefed below. Petitioners responded then and respond now, by citing *Brothers* v. *McMahon*, 351 Ill. App. 321, 115 N.E.2d 116 (1953), and *State* v. *Silberberg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956), which support petitioners' view.*

* It should be noted that respondents' claim that Congress intended to "cover all securities subject to the existing blue sky laws of 47 states" (Resp. Br. 42) is not supported in fact. The pages of H.R. Rep. No. 85 which they cite refer to proposed Section 18, making it unlawful to use facilities of interstate commerce to sell or deliver securities in violation of state law. *Id.* at 25. The section was not enacted. The cited pages of S. Rep. No. 47 express criticism of State blue sky laws and an intention not to exempt securities merely because they are subject to them.

However, it serves no useful purpose to make a "head count" of state decisions.* The fact is that state court decisions with respect to which state statute or state agency is to govern sales of cooperative apartments are based on entirely different considerations than those before this Court.** Moreover, the state statutes are so varied as to be of no probative significance. In this regard, the New York law is a good illustration.

The original New York "blue sky" law, enacted in 1921, is now contained in Section 352 of the General Business Law. It covers "stocks, bonds, notes, evidence of interest or indebtedness or other securities." It vests regulatory jurisdiction in the state Attorney General. But despite the breadth of its definitional language, it is not used to regulate cooperatives.

Instead, the sale of cooperatives in New York is covered by Section 352-e of the General Business Law, adopted in 1960. Section 352-e covers real estate syndications, "including cooperative interests in realty." It covers all

* The respondents also urge a "head count" of commentators (Resp. Br. 47-48). But they distort Professor Loss's views by citing his treatise to support a literal approach, see 1 Loss, Securities Regulation 492-94 and n. 103 (1961); and they ignore many articles rejecting the view that housing cooperative "stock" is a security, *e.g.*, Dickey and Thorpe, Federal Security Regulation of Condominium Offerings, 19 N.Y.L. Forum 473 (1974); Coffey, The Economic Realities of a 'Security': Is There a More Meaningful Formula?, 18 W. Res. L. Rev. 367, 399-400 (1967); Miller, Cooperative Apartments: Real Estate or Securities?, 45 Boston U.L. Rev. 465 (1965).

** Policy considerations under the federal securities laws include the potential supplanting of the substantive laws of 50 states by a single national law, the opening of federal courts to virtually all disputes arising out of transactions in cooperative homes and the application of the vast regulatory authority of the SEC.

condominiums as well, whether the primary motive of the purchasers is residence or profit from subletting. *See* N.Y. Real Prop. L. §339-ee. In some places it refers to such syndications, including all cooperatives and condominiums, as securities. It also vests regulatory jurisdiction in the Attorney General. Thus, in New York, there is a specific statute expressly regulating sales of cooperatives, condominiums and other forms of real estate syndications, separate and apart from the general blue sky law regulating stocks and bonds.

C. Respondents Have Misapplied the *Howey* Profit Test.

This Court has long held that the inducement and promise of financial return on one's investment, the lure of money profits, is an essential element of an investment contract. Respondents ask this Court to expand that rule to include the novel profit theory adopted by the court below: that savings in rents made possible by government subsidies, incidental income from commercial facilities, and personal income tax deductions routinely available to all home owners, consitute the kind of "profit" which creates a security in the form of an investment contract.

As set forth above, *see* p. 10, *supra,* and in our principal brief (UHF Br. 11-12, 28-32), there can be no profit from resale of Co-op City's memberships. And the modest tax deductions and incidental income from commercial facilities (if any) were never promised or used as an inducement to prospective members and cannot be defined as "profit" by any reasonable standard.

Moreover, the cases cited by respondents simply do not support their novel theory of profit. For example, *Davenport* v. *United States*, 260 F.2d 591 (9th Cir. 1958), *cert. denied* 359 U.S. 909 (1959) involved an appeal from a conviction of conspiracy to commit mail and securities fraud. The entity involved was to be a plywood manufacturing cooperative—a business enterprise designed to make money for its shareholders. No issue as to the definition of a security was even mentioned in the decision. Respondents' assertion that the Court of Appeals "found that the mere expectation of employment and job security was sufficient to make a certificate of membership in a cooperative a 'security'" (Resp. Br. 52) is thus patently false. *State ex rel. Troy* v. *Lumbermen's Clinic*, 186 Wash. 384, 58 P.2d 872 (1936), was a *quo warranto* proceeding under Washington law to determine whether the charitable enterprise could provide medical services to businesses for a fee. Respondents' remaining cases, which involve definitions of "nonprofit" in the context of state laws covering incorporation or tax exemption of non-profit entities, are equally inapposite.

In addition to citing decisions which are not even remotely in point, respondents blindly ignore the plain fact that virtually the entire "profit" they claim Co-op City members receive flows from the very substantial government subsidies provided by the State and City. Those subsidies are no more investment "profit" than are savings from food stamps, where a person pays money and receives documents entitling him to obtain more than his money's worth of food from the grocery store. Here, respondents have paid money to receive a certificate entitling

them to more than their money's worth of housing. Clearly, both the food stamp and the housing "stamp" provide public subsidies, not "investment contract" profit.

D. The "Risk Capital" Approach Advanced by Respondents Would Stretch the Securities Laws Far Beyond What Congress Intended.

Respondents also ask this Court to abandon entirely the profit requirement of *SEC* v. *W. J. Howey Co.*, 328 U.S. 293 (1946), and to replace it with a so-called "risk capital" approach, which would make an investment contract out of every transaction in which, although there is no expectation of monetary return, "there is the element of risk capital coupled with some economic benefit" (Resp. Br. 53-54).

But application of that approach to the facts of this case is not supported by the cases respondents have cited and would expand the scope of the securities laws far beyond their intended coverage.

Nearly all of the cases respondents cite involved promises of direct monetary profits as a principal inducement for entering into the transactions at issue. For example, the long string of cases cited on p. 56 of respondents' brief all involved pyramid or franchising schemes in which investors were lured by the promise of substantial return on their investments. *See, e.g., Venture Investment Co., Inc.* v. *Schaefer*, 3 Blue Sky L. Rep. ¶71,031 (D. Col. 1972), *aff'd* 478 F.2d 156 (10th Cir. 1973) (involving false representation that franchiser had written up $8,000-$10,000 worth of business each month in same-size area; Colorado

law applied); *Murphy* v. *Dare to Be Great*, 3 Blue Sky L. Rep. ¶71,053 at 67,281 (D.C. Super. Ct. 1972) (pay $1,000, enroll three members, "and then just sit back and watch the money roll in").

Respondents' reliance upon the California Supreme Court decision in *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P.2d 906 (1961) is also misplaced. There, the Court was construing a California statute which did not require profit as an element of a "security." *Id.* at 908. Furthermore, the cost of the club memberships would increase after the club was started. Because the memberships were transferrable, members would be in a position to realize a direct cash gain upon their sale. As one commentator has noted, "The *Silver Hills* fact pattern contains an element of expected profits." Coffey, *supra*, 18 W. Res. L. Rev. at 400 n. 143.

El Khadem v. *Equity Securities Corp.*, 494 F. 2d 1224 (9th Cir.), *cert. denied* —— U.S. —— (1974) is also inapposite. It arose in a purely investment context and involved a complex margin scheme whereby the plaintiff borrowed money from defendant Nationwide to purchase securities, pledging those and other securities of 175% of the value of the loan as collateral. Nationwide rehypothecated the collateral, which was ultimately lost. It was, in short, an investment scheme that went sour. The facts are not even remotely similar to this case.

In summary, the risk capital theory advanced by respondents is simply not supported by any of the cases they cite. Moreover, even if there were case support for respondents' "risk capital" argument, Co-op City's memberships, as to which there is practically no risk of loss* and no possibility of profit, are simply not the kinds of interests which would qualify as securities under it. Finally, it is apparent that the risk capital approach advocated by respondents is fundamentally inconsistent with the intended scope of the securities laws and the definitions of "security" long established by this Court. Under respondents' approach, for example, every executory contract in which the purchaser advanced all or part of the purchase price would be a security. But that absurd result was intended by Congress no more than it intended to include Co-op City's non-profit shares within its securities legislation.

E. Respondents' Investment Contract Theory Conflicts with Current SEC Regulations.

Whether SEC Release 33-5347 was intended to cover both cooperatives and condominiums, as argued by petitioners, or was only intended to cover condominiums, as argued by respondents, a fundamental inconsistency exists between the investment contract theory advanced here by the respondents (and adopted by the Court below) and the investment contract theory set forth in the Release.

---

* Respondents' risk is extremely limited by statute and the State's supervisory involvement. By statute, foreclosure by a private party is substantially restricted. Housing Law §§34, 94, 95. While foreclosure by certain state agencies, including the New York State Housing Finance Agency, is not so restricted, the Commissioner of Housing must be made a party and "shall take all steps necessary to protect the interests of the public . . . ." Housing Law §§34, 94(2). During the construction of the project, the State could, and did, advance additional funds to ensure completion. No development financed under the Housing Law has ever failed to complete construction, gone bankrupt or been foreclosed. No cooperative member has ever lost his investment in a cooperative built under the Housing Law.

Briefly put, if the economic benefit of good housing at low cost, or personal income tax deductions, is a "profit" when the housing is a cooperative, as the respondents argue, is it not also a "profit" when the housing is a condominium? And if placing capital at "risk" in a housing cooperative creates a security, does it not also create a security when the housing is a condominium?

It is apparent that the arguments advanced by respondents would make every condominium a "security" and would thereby erase the careful distinction between purchases for residential use and purchases for investment profit which is elaborated in SEC Release 33-5347, and in the Advisory Report that preceded it.* *See also* Berman & Stone, *Federal Securities Law and the Sale of Condominiums, Homes and Homesites*, 30 Bus. Lawyer 411, 420-24 (1975) (recognizing this inherent conflict between SEC Release 33-5347 and the decision below).

---

* Indeed, that sound distinction finds support, *inter alia*, in the language of this Court in *SEC* v. *W. J. Howey Co.*, 328 U.S. at 299-300:

> "The respondent companies are offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services. They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise . . . . They are offering this opportunity to . . . persons [who] have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment";

and *SEC* v. *C. M. Joiner Leasing Co.*, 320 U.S. at 352 n. 10,

> "One's cemetery lot is not ordinarily thought of as an investment and is most certainly real estate. But when such interests become the subjects of speculation in connection with the cemetery enterprise, courts have held conveyances of these lots to be securities."

See also UHF Br. 32 and n. 26.

Petitioners submit that the distinctions drawn in SEC Release 33-5347 are sound and correctly state the underlying legal principles applicable to condominiums and (whether or not so intended by the SEC) to cooperatives as well. No reason has been advanced to justify treating them differently. None exists.*

Conclusion

Respondents are seeking an unjustified and unprecedented expansion of the scope of the federal securities laws. Their argument, in substance, is that because they invested money and because they alleged fraud in their complaint, the securities laws apply and their suit may be maintained in a federal court.

That argument cannot be accepted. As we pointed out in our principal brief, the securities laws are not a catchall for disparate complaints and problems. The securities laws are designed to protect investors in the commercial marketplace, not consumers seeking housing; they cover trans-

---

* As described in our principal brief (*e.g.*, UHF Br. 42-43), Congress continues to treat cooperatives and condominiums alike. Both are treated as residences, not investment securities. A recent example is Section 208 of the Tax Reduction Act of 1975, P.L. No. 94-12, Mar. 29, 1975. Section 208, designed to combat the economic decline in the housing industry, provides for a tax credit on the purchase of a "new principal residence" defined as:

> "a principal residence (within the meaning of section 1034), the original use of which commences with the taxpayer, and includes, without being limited to, a single family structure, a residential unit in a condominium or cooperative housing project, and a mobile home."

Congress is obviously not subsidizing investments in "securities" but purchases of "housing." Other illustrations not previously noted appear in Internal Revenue Code §§121(d)(3), 1034(f).

actions in investment securities, not transactions in personal residences.

Accordingly, we respectfully submit that the decision of the court below should be reversed and the complaint dismissed for lack of federal subject matter jurisdiction.

Dated: New York, New York
April 16, 1975

Respectfully submitted,

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10022
(212) 644-8602

Attorney for Petitioners
United Housing Foundation, Inc., et al.

MARTIN LONDON
GEORGE P. FELLEMAN
MARSHALL BEIL
CAROL GOODMAN
ALAN G. BLUMBERG
Of Counsel

Supreme Court, U. S.
FILED
APR 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS, THE STATE OF NEW YORK AND NEW YORK STATE HOUSING FINANCE AGENCY

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing
Finance Agency
Two World Trade Center
New York, New York 10047
212-488-3446

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS, THE STATE OF NEW YORK AND NEW YORK STATE HOUSING FINANCE AGENCY

A.

Beclouding the atmosphere seems to have been deemed essential to a maintenance of the respondents' position. We submit that the significant constitutional issue here presented should not be so beclouded.

The respondents (pp. 4, 20, 77) make a desperate attempt to convince this Court that the State (like the state which *owned* a railroad in *Parden* v. *Terminal Railway,* 377 U.S. 184 (1964) has a *proprietary* interest in the cooperative housing project whose construction it has regulated and whose operation it continues to regulate. But the mere fact that it received a fee for regulating construction of the project did not establish it as a proprietor. The amount of the fee, although it might be considered extraordinary for the supervision of the construction of an ordinary project, amounts to only approximately 1% of the total construction cost of "Coop City" and undoubtedly failed to compensate the State fully for exercising its regulatory function.

The weakness of respondents' position is emphasized by the fact that it did not even dare to suggest in either of the Courts below that the State had a proprietary interest in Coop City. We are confident that this Court will not be misled by this new emphasis. The individual plaintiffs here would be more than amazed to discover that they had been or become subscribers to shares in a state-*owned* project.

Respondents' conception of New York's housing program before 1955 is equally distorted. Cooperatives were a form of state-aided housing long before that. This is demonstrated by the dispassionate opinion of Judge Froessel in *Fruhling* v. *Amalgamated Housing Corp.,* 9 N Y 2d 541 (1961) app. dism. 368 U.S. 70 (1961), where in dealing with the historical development of Public Housing Law, § 182, subd. 3, par. (b), he referred to a 1948 Housing Division memorandum and stated (9 N Y 2d at p. 549):

> "The historical development of paragraph (b) of subdivision 3 clearly demonstrates that the purpose of the provision was to accord tenants in co-operative projects under the act *separate* and *special* treatment

in light of the fact that they had to purchase stock as a condition precedent to occupancy. This is apparent from the memorandum of the Division of Housing itself at the time paragraph (b) was enacted (N. Y. Legis. Ann., 1948, p. 227) and by the very provisions of paragraph (b) (L. 1948, ch. 610). Thus paragraph (b) was introduced by the phrase 'Notwithstanding the provisions of paragraph (a)'; and it initially provided that the income to rental ratio for continued occupancy in co-operatives was to be 7 to 1 and 8 to 1 as opposed to 5 to 1 and 6 to 1 for non-co-operative housing under paragraph (a); and, further, an *unlimited* grace period, within the discretion of the Commissioner, for continued occupancy of over-income tenants was provided. In 1951, when the surcharge provisions were introduced into paragraph (a) (L. 1951, ch. 532), a like provision was not added to paragraph (b), and, when amending paragraph (b) in 1960, the Legislature in a note annexed to the amendment (1 Laws of New York, 1960, p. 920, n.) expressly recognized that it had theretofore accorded tenants in co-operatives special treatment, particularly in regard to surcharges."

The fact is that the Public Housing Law provided for a form of cooperative organization in state-aided projects at least as early as 1928,* when a portion of State Housing Law, § 16 (L. 1928, § 722) provided explicitly:

> "When tenants own stock in a limited dividend corporation incorporated under this act, a sinking fund

---

* As a matter of fact, initial occupancy of Amalgamated Houses began in December, 1927. See Report of N.Y. State Board of Housing, February 29, 1928 to Governor Alfred E. Smith and to the Legislature. New York Legislative Document (1928) No. 76, stated (p. 17):

> "The Amalgamated project was completed in December and formally opened for occupancy on Christmas Day. It is being operated on a cooperative basis, and most of the tenants are holders of stock in the Corporation."

> may with the approval and subject to the regulations of the board be set up and maintained out of the net profits applicable to surplus and used subject to the regulations of the board for the purchase at not to exceed par and accrued interest of the stock held by tenants ceasing to be occupants of the buildings; shares so purchased may be resold by the corporation."

Respondents' argument of "waiver by conduct" (70-78), therefore, has no true factual or historical basis.

B.

The Securities and Exchange Act of 1934 did not include the States within the definition of "persons" controlled by that Act. Nor should the State itself be deemed a "person" within the meaning of the Civil Rights Act. *Monroe* v. *Pape,* 365 U.S. 167 (1961).

C.

As to the State Housing Finance Agency, which furnished the financing essential to complete the project in which the respondents dwell—and would have no such dwelling place without such financing—this suit is utterly frivolous. It is virtually fantastic that any federal court should permit the claims pleaded against this *financing* agency to be given any serious consideration. How could plaintiffs be *hurt* by an agency which lent the money needed to complete the project undertaken by the corporation whose shares they had purchased?

D.

As to the State itself, the respondents' efforts to distinguish this Court's decision in *Edelman* v. *Jordan* 415 U.S. 651 (1974), which the Court of Appeals completely disregarded (a fact which respondents do not even blink at) seem futile. The rationale of *Edelman* is sound and should not be so soon whittled away.

E.

The respondents, in alleging an express waiver of immunity, by the provisions of Private Housing Finance Law, § 32(5), have overlooked two facts. First, it was not intended as an *extension* of the State's liability to suit. The memorandum of the State Division of Housing and Community Renewal, in support of the legislation, clearly stated that it sought only to "preserve" such liability. New York State Legislative Annual (1964), p. 343. Second, the paragraph including the alleged waiver was clearly intended to apply only to *state* court suits for it included a sentence, not quoted by respondents,* directing that "no costs" should be awarded against the commissioner, the state or the supervising agency, as the case may be, "in any such litigation". The Legislature in New York could hardly have contemplated controlling the imposition of costs in a federal or other court not subject to its jurisdiction. Certainly, the New York statutory provision did not contain the express consent which this Court has required to a suit in the federal courts. *Murray* v. *Wilson Distilling Co.,* 213 U.S. 151, 172 (1909); *Graves* v. *Texas Co.,* 298 U.S. 393, 403-404 (1936); *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 54 (1944); *Ford Co.* v. *Dept. of Treasury,* 323 U.S. 459, 462-463, 465-466 (1945); *Kennecott Copper Corp.* v. *Tax Commission,* 327 U.S. 573 (1946). Indeed, in the last-named case, this Court, referring to the *Read* and *Ford* cases, stated (p. 578):

> "We said in those cases that since state laws could not affect procedure in federal courts, it was to be inferred that only state courts were included in the States' consent to suit."

---

* The sentence omitted by the respondents reads:
"No costs shall be awarded against the commissioner, the State, or the supervising agency, as the case may be, in any such litigation".

Presumptively and clearly, New York was dealing with costs *in its own courts,* rather than setting up a pre-condition to suits in courts of another jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the complaint herein should be dismissed against the State and its Housing Agency.

Dated: New York, New York, April 9, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing
Finance Agency.

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

Supreme Court, U. S.
FILED
APR 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 & 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 & 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

After our reply brief had been printed, there came to our attention a decision handed down on April 2, 1975 by the United States Court of Appeals for the Sixth Circuit which supports our position and merits this Court's attention.

In *Brown* v. *The Commonwealth of Kentucky*, No. 74-1347, the Sixth Circuit sustained the dismissal of a suit against the State for damages "resulting from alleged violations by its officials of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78(j), Rule 10b-3, 17 C.F.R. 240.10b-5 and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(g)".

The *per curiam* opinion of the Court in *Brown* (*supra*) is annexed as an Appendix for this Court's convenience.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the complaint herein should be dismissed against the State and its housing agency.

Dated: New York, New York, April 19, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

APPENDIX

No. 74—1347

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTHUR W. BROWN, Receiver,

Plaintiff-Appellant,

v.

THE COMMONWEALTH OF KENTUCKY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed April 2, 1975.

Before: MILLER, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. This appeal presents the sole issue of whether the Eleventh Amendment[1] to the Constitution protects the Commonwealth of Kentucky from suit by

---

[1] The Eleventh Amendment provides:
"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

one of its citizens[2] for damages resulting from alleged violations by its officials of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (j), Rule 10 b-5, 17 C.F.R. 240.10b-5 and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(q).[3] The District Court held that

[2] The language of the Amendment has consistently been construed to bar suits by the state's own citizens as well as citizens of other states. *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Duhne* v. *New Jersey*, 251 U.S. 311 (1920); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944); *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964); *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[3] Section 17 of the Securities Act of 1933 provides:

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(*footnote continued on following page*)

such a suit against the state was barred and dismissed the action against the Commonwealth accordingly. We affirm.

Plaintiff Arthur W. Brown was appointed by the Jefferson County Circuit Judge as a Receiver of Prudential Building and Loan Association, an insolvent Louisville savings and loan association organized under Kentucky law. Plaintiff sought to recover for the Association's members, creditors and depositors some $23,000,000 in damages, charging that this amount was lost through the fraudulent or grossly negligent failure of the Commissioner of Banking and Securities and certain named loan examiners employed by that department to discover the mismanagement and unlawful self-dealings of the president and certain officers of the Association over a four year period.

(*footnote continued from preceding page*)

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

Section 10(b) of the Securities Exchange Act of 1934 provides:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

Under Kentucky Revised Statutes 289.710, the Commissioner of Banking and Securities, or an examiner, is required annually and without notice to "make a thorough examination into the condition, workings and affairs of the association", K.R.S. 289.710(1), and to "report any violation of law or any unauthorized or unfit practices or any failure to keep or have correct amounts of business of the association . . .", K.R.S. 289.710(2). The complaint specifically alleged that one of the state loan examiners indirectly accepted payments from Prudential for services purportedly performed by the examiner's wife in violation of K.R.S. 289.690. That statute forbids an examiner, directly or indirectly, from receiving any payment, compensation or gratuity from any association. It was further charged that ". . . no reasonable person could have made any kind of examination of Prudential without discovering and reporting the many improper and illegal acts and omissions of Prudential management". Accordingly, it was alleged, by such gross neglect of its statutory duty to inspect, the Commonwealth permitted the Association to become insolvent.

In *Tcherepnin* v. *Knight*, 389 U.S. 322 (1967), the Supreme Court held that capital shares of a state chartered savings and loan association are "securities" within the meaning of Section 10(b) of the Securities Exchange Act of 1934. On this basis, plaintiff claimed that the failure to discover and disclose the insolvency of the Association amounted to "a failure to [illegible]se under the Exchange Act" warranting the invocatio[illegible] District Court's federal question jurisdiction, 28 U.S.C. §§ 1331, 1337, 15 U.S.C. §§ 78(aa) and 77(v).

In *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964) the Supreme Court held that by its operation of a common carrier railroad in interstate commerce, the State of Alabama waived its sovereign immunity and consented to a suit

brought in federal court by employees of the railroad under the Federal Employers' Liability Act. While observing that "It remains the law that a State may not be sued by an individual without its consent", 377 U.S. at 192, *Parden* nevertheless held that consent was necessarily granted by Alabama when it entered into the interstate railroad business approximately 20 years after the enactment of the FELA. In like manner, urges the receiver here, in the 1933 and 1934 Acts "Congress has enacted a comprehensive scheme of laws regulating the sales of securities and has given exclusive jurisdiction to the federal courts to hear such actions". This, he argues, by interposing itself completely in the affairs of Prudential and hence, at least since *Tcherepnin*, a sphere of activity subject to concurrent federal regulation, the Commonwealth of Kentucky must therefore be deemed to have waived its immunity to suit.

Whatever doubts may have been raised concerning the continuing viability of the immunity doctrine under the Eleventh Amendment after *Parden* v. *Terminal R. Co.*, *supra*, have been since laid to rest by *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973) and *Edelman* v. *Jordan*, 415 U.S. 651 (1974). As pointed out in *Edelman*, "The question of waiver or consent under the Eleventh Amendment was found in those cases (*Parden, Employees* and other citations therein) to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman* v. *Jordan, supra*, at 672.

Our examination of both the Securities Act of 1933 and the Securities Exchange Act of 1934 totally fails to reveal "a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." *Employees* v. *Missouri Public Health Dept., supra*, at 285. Here the statutory duty imposed upon the Kentucky

Commissioner of Banking and Securities cannot in any way be construed as the exercise of a proprietary function, but is rather clearly the exercise of a regulatory function of the state over its own chartered institutions which has been historically exercised as part of its governmental powers. There is nothing to suggest that either federal act was intended to be or should be construed either to divest the Commonwealth of Kentucky of the power to regulate its state chartered institutions or beyond that, to do so only upon condition of its consent to be sued by one of its own citizens if that power is for any reason improperly exercised. *Edelman* v. *Jordan, supra,* made it manifestly clear that:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In this case, plaintiff has sought money damages from the Commonwealth itself. No injunctive or other merely prospective relief has been sought. Cf. *Ex Parte Young,* 209 U.S. 123 (1908). Recovery, if any, will come from the state treasury. This, we think, is the clearest type of case in which the Eleventh Amendment bar against suit protects the state. Accordingly, since we find no waiver of the Amendment, the judgment dismissing the Commonwealth of Kentucky as a defendant in the above entitled cause is affirmed. Costs to appellees.

Supreme Court, U. S.
FILED
APR 17 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-157 and 74-647

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED HOUSING FOUNDATION, INC., ET AL.,
PETITIONERS

v.

MILTON FORMAN, ET AL.

THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY, PETITIONERS

v.

MILTON FORMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
ROBERT B. REICH,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

LAWRENCE E. NERHEIM,
General Counsel,
PAUL GONSON,
Associate General Counsel,
RICHARD E. NATHAN,
Assistant General Counsel,
Securities and Exchange Commission,
Washington, D.C. 20549.

INDEX

	Page
Question presented	1
Interest of Securities and Exchange Commission	1
Statement	2
Summary of Argument	5
Argument:	
I. Riverbay stock is a security	7
A. The shares issued by Riverbay Corporation are securities because they are stock	7
B. Economic reality indicates that the shareholders' investment in Riverbay is a security—they have entrusted their capital to the management of others as a result of economic inducements	10
II. Application of the federal securities laws to stock issued by state-sponsored housing cooperatives is not barred by other state or federal regulatory schemes	17
III. Application of the federal securities laws will not impede the public housing industry nor seriously interfere with commercial cooperative ventures	20
Conclusion	24

573-169—75——1

CITATIONS

Cases:

	Page
Affiliated Ute Citizens v. *United States*, 406 U.S. 128	2
Davenport v. *United States*, 260 F. 2d 591, certiorari denied, 359 U.S. 909	16
El Khadem v. *Equity Securities Corporation*, 494 F. 2d 1224, certiorari denied, October 24, 1974, No. 74–46	16
J. I. Case v. *Borak*, 377 U.S. 426	2
Kern County Land Co. v. *Occidental Petroleum Corp.*, 411 U.S. 582	7
Lino v. *City Investing Co.*, 487 F. 2d 689	16
Miller v. *Central Chinchilla Group, Inc.*, 494 F. 2d 414	16
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375	2
Securities and Exchange Commission v. *Capital Gains Research Bureau*, 375 U.S. 180	11
Securities and Exchange Commission v. *C. M. Joiner Leasing Corporation*, 320 U.S. 344	5, 7, 8, 9, 12, 16, 17, 19
Securities and Exchange Commission v. *Glenn W. Turner Enterprises, Inc.*, 348 F. Supp. 766 affirmed, 474 F. 2d 476, certiorari denied, 414 U.S. 821	12, 16
Securities and Exchange Commission v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473	16
Securities and Exchange Commission v. *W. J. Howey, Co.*, 151 F. 2d 714, reversed, 328 U.S. 293	10, 11, 12, 16, 17, 19
Securities and Exchange Commission v. *National Securities*, 393 U.S. 453	17
Securities and Exchange Commission v. *United Benefit Life Insurance Company*, 387 U.S. 202	9, 10, 17

Cases—Continued

	Page
Securities and Exchange Commission v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65	10, 12, 18
Silver Hills Country Club v. *Sobieski*, 55 Cal. 2d 811, 361 P. 2d 906	16
State Commission of Securities v. *Hawaii Market Center, Inc.*, 52 Ha. 642, 485 P. 2d 105	16
State ex. rel. Troy v. *Lumberman's Clinic*, 186 Wash. 384, 58 P. 2d 816	16
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6	2
Tcherepnin v. *Knight*, 389 U.S. 332	7, 8, 11, 12

Statutes and regulations:

Housing and Community Development Act of 1974, Sec. 821, Pub. L. 93–383, 88 Stat. 740	19
Interstate Land Sales Full Disclosure Act, as amended, 15 U.S.C. 1701–1720	19
Real Estate Settlement Procedures Act of 1974, Pub. L. 93–533, 88 Stat. 1724–1731	19
Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a, *et seq*	7
Sec. 2(1), 15 U.S.C. 77b(1)	7
Sec. 3(a)(2), 15 U.S.C. 77c(a)(2)	21
Sec. 3(a)(4), 15 U.S.C. 77c(a)(4)	21
Sec. 3(a)(5), 15 U.S.C. 77c(a)(5)	18
Sec. 3(a)(11), 15 U.S.C. 77c(a)(11)	20
Sec. 3(b), 15 U.S.C. 77c(b)	22
Sec. 17(a), 15 U.S.C. 77q(a)	3
Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq*	11
Sec. 3(a)(3), 15 U.S.C. 78c(a)(3)	8
Sec. 3(a)(10), 15 U.S.C. 78c(a)(10)	7, 8
Sec. 3(a)(12), 15 U.S.C. 78c(a)(12)	21
Sec. 10(b), 15 U.S.C. 78j(b)	2, 3

Statutes and regulations—Continued
Securities Exchange Act of 1934—Continued Page
Sec. 12(g), 15 U.S.C. 78*l*(g) 21, 22
Sec. 12(g)(2), 15 U.S.C. 78*l*(g)(2) 18, 21, 22
Sec. 16(b), 15 U.S.C. 78p(b) 7, 8
N.Y. Gen. Bus. Law (McKinney 1968 ed., Supp. 1974):
§§ 352–359 9
§ 352–e 9
N.Y. Private Housing Finance Law (McKinney 1962 ed., Supp. 1974):
§ 2(14–1) 3
§ 10 3
§ 12(2) 3
§ 12(2–b) 4
§ 13 3
§ 17(a) 13
§ 17(b) 13
§ 17(e) 13
§ 17(i) 13
§ 17(j) 13
§ 22 4
§§ 27–31 4
§ 28(2) 13
§ 29 4
§ 31(2)(a) 4
§ 31(7) 14
§ 31(8) 14
§ 33 4
§ 35 14
17 C.F.R. 202.1(d) 23
17 C.F.R. 230.235 22
17 C.F.R. 240.10b–5 3
17 C.F.R. 240.15a–2 23

Miscellaneous:
Page
120 Cong. Rec. H5371 (daily ed., June 20, 1974) 20
Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 4314, 73d Cong., 1st Sess 10
Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on H.R. 6789, H.R. 6793, S. 1642, 88th Cong., 1st and 2d Sess. (Part II) 21
Hearings before a Subcommittee of the Senate Committee on Banking and Currency, on S. 2672, 89th Cong., 2d Sess 19
H. Rep. No. 85, 73d Cong., 1st Sess 10, 11, 23
H. Rep. No. 1383, 73d Cong., 2d Sess 11, 12
Securities Act Release No. 4305 (December 8, 1960), 25 Fed. Reg. 12912 22
Securities Act Release No. 5347 (January 4, 1973), 38 Fed. Reg. 1735 22
Securities Exchange Act Release No. 3963 (June 10, 1947), 13 Fed. Reg. 8204 23
S. Rep. No. 47, 73d Cong., 1st Sess 10, 11, 18

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–157

UNITED HOUSING FOUNDATION, INC., ET AL.,
PETITIONERS

v.

MILTON FORMAN, ET AL.

No. 74–647

THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY, PETITIONERS

v.

MILTON FORMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

QUESTION PRESENTED

The Commission will discuss the first question presented: Whether shares of common stock in a cooperative housing corporation, offered and sold for more than $32,000,000 to more than 15,000 purchasers, constitute "securities" within the meaning of the federal securities laws.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Commission is primarily responsible for the administration and enforcement of the federal securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934. The construction of the term "security" in these acts necessarily determines their applicability in Commission enforcement actions. Private actions by victims of securities laws violations provide a "necessary supplement" to the Commission's enforcement activities. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432.[1] The construction of the term "security" also affects the availability of these private remedies.

The Commission opposes restrictive constructions of the securities laws and of the Commission's rules that would weaken the protections they afford investors and narrowly restrict the range of circumstances to which they apply. The Commission has a strong interest in establishing that the instrument involved in the present case—which is represented to be "stock", which evidences an interest in a corporate enterprise over which investors have no direct control, and which is sold upon the promise of significant economic benefits—is a "security" as defined in the federal securities laws.

[1] This Court has noted that "[i]t is now established that a private right of action is implied under § 10(b)" of the Securities Exchange Act, 15 U.S.C. 78j(b). *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n. 9. Also see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128.

STATEMENT

Certain shareholders of Riverbay Corporation, a limited profit housing company organized under the New York Private Housing Finance Law,[2] brought this action for damages on behalf of themselves, all other Riverbay shareholders, and derivatively on behalf of the corporation, based upon alleged violations of antifraud provisions of the federal securities laws in connection with the offer and sale to them of Riverbay stock.[3] They sought relief against United Housing Foundation, Inc., which initiated and sponsored the project; Community Services, Inc., a profit-making subsidiary of United Housing, which was the sales agent for Riverbay and was the general contractor for the project; certain officers and directors of these corporations; and the State of New York and the New York State Housing Finance Agency (A. 9, 10).[4]

Riverbay shareholders have invested an aggregate of $32,803,200 in the project. They received certificates denominated as Riverbay "stock" (170a).

[2] N.Y. Private Housing Finance Law §§ 2(14–a), 10 and 12(2) (McKinney 1962 ed., Supp. 1974). Article II of that law essentially provides for the creation of "limited-profit housing companies" (§ 13).

[3] The antifraud provisions alleged to have been violated are Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a). Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b–5 promulgated thereunder, 17 C.F.R. 240.10b–5.

[4] "A." refers to the appendix filed with petitioners' brief in No. 74–157; "P.A." and "P.B." refer to the appendix filed with the petition for certiorari in No. 74–157; "a" preceded by page number refers to the appendix before the court of appeals; "Br." refers to the brief of petitioners United Housing Foundation, Inc., *et al.*

573–169—75 —2

By virtue of their stock ownership, Riverbay shareholders are entitled to occupy apartment units in a vast cooperative housing project that Riverbay owns and operates (P.A. 5). The project houses approximately 45,000 residents in some 15,400 apartment units (P.A. 3).

Shareholders are also entitled to dividends from any surplus corporate earnings, to be distributed in the form of a reduction in the carrying charges of the apartment units (P.A. 16; 162a), as well as tax deductions for their pro rata share of the real estate taxes and mortgage interest payments made by the corporation (P.A. 17; 175a), and they obtain substantial savings on the cost of housing (P.A. 17).[5]

The complaint charged that Riverbay Corporation sales literature, in the form of an "Information Bulletin" given to prospective buyers, was false and misleading in that it represented that the monthly carrying charge per room would be $23.02, while the charge has in fact been $42.47; that the project would cost $283,695,550, of which $250,900,000 would be financed with a mortgage provided by the New York State Housing Financing Agency when, in fact, the

[5] The N.Y. Private Housing Finance Law provides that a limited profit housing company, subject to state or local supervision, is entitled to borrow up to 95 percent of the cost of a housing project at low interest from the state or a municipality (§§ 22, 27–31). Tax exemptions are provided (§ 33) as is the right of condemnation by a municipality (§ 29). The stock of the company is held by the tenants (§ 12(2–b)), whose probable income may not exceed six times the carrying charges they are obligated to pay each year (§ 31(2)(a)). These charges represent a proportionate allocation of the expenses of the company, including maintenance, taxes, and mortgage indebtedness.

Agency and agents of the corporation had agreed that the project would cost over $400,000,000, financed through a $375,755,710 mortgage loan; and that any increase in construction cost would be absorbed by the contractor, when in fact all increases have been passed on to the shareholders (A. 12–22; 172a).

The district court granted petitioners' motion to dismiss the complaint, holding that respondents' shares in Riverbay were not "securities" within the meaning of the federal securities laws (P.B. 28). The court of appeals reversed, holding that Riverbay stock is a "security," and remanded for further proceedings (P.A. 20, 22).

SUMMARY OF ARGUMENT

One of the important indicia that Riverbay stock is a security within the meaning of the securities acts is its formal denomination as "stock," a word that carries a well-settled meaning (*Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation,* 320 U.S. 344, 351), and its representation to the public as an "investment" opportunity. Investors may reasonably assume, therefore, that they are purchasing a security.

Another of the indicia is the fact that an investor's money is entrusted to the management of an enterprise over which he exercises no managerial control. The success of Riverbay, and the preservation of the value of capital invested by 15,372 low income investors, depends upon the skill and efforts of the Riverbay management. Riverbay's directors, elected by the shareholders, possess the powers of directors of conventional business corporations.

In addition, significant economic inducements are held out to investors, in the form of promises that stock in Riverbay will entitle them to low-cost housing, tax savings, and dividends from surplus earnings in the form of reduced carrying charges. These economic inducements are sufficient to bring the offering within the ambit of the securities acts, notwithstanding that they are only indirect monetary gains or that investors in fact occupy the housing to which their stock entitles them.

The fact that Riverbay is under the general supervision of the State of New York Housing Agency does not remove it from the federal securities laws. Indeed, those laws contemplated concurrent regulation. Application of the securities acts to limited profit cooperative housing is not inconsistent with other federal regulatory schemes, intended only to govern non-investment aspects of such transactions.

Finally, application of the federal securities laws will not impede the public housing industry or seriously interfere with commercial cooperative ventures. Offers of shares in a cooperative housing enterprise are likely to come within one of several categories of securities exempted from the registration requirements of the federal acts. While these exemptions would not apply to the antifraud provisions, compliance with the antifraud provisions should strengthen rather than weaken the industry by helping to assure that low income persons who invest their limited savings in cooperative housing enterprises are provided with truthful and complete information concerning

the kind of obligations they may incur and the benefits they may reasonably expect to receive.

ARGUMENT

I

RIVERBAY STOCK IS A SECURITY

A. THE SHARES ISSUED BY RIVERBAY CORPORATION ARE SECURITIES BECAUSE THEY ARE STOCK

Section 3(a)(10) of the Securities Exchange Act of 1934 (as amended, 15 U.S.C. 78c(a)(10)) defines a "security" as "any * * * stock, * * * investment contract, * * * or, in general, any instrument commonly known as a 'security.'" A virtually identical definition appears in Section 2(1) of the Securities Act of 1933 (as amended, 15 U.S.C. 77b (1)). See *Tcherepnin* v. *Knight*, 389 U.S. 332.

In determining whether Riverbay stock is a security, it is important that it is offered to the public as "stock." As this Court has noted, with "stocks, * * * the name alone carries well-settled meaning" and documents are included within the definition "if *on their face* they answer to the name or description." *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U.S. 344, 351 (emphasis supplied).[6]

---

[6] *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, upon which petitioners United Housing (hereinafter designated as "petitioners") rely, does not stand for the proposition that offerings literally deemed "stock" are not "securities" under the securities acts. In *Kern* this Court determined that an exchange of securities in the aftermath of the merger in question was not a "sale" within the language of Section 16(b) of the Securities Exchange Act because the transactions at issue were not susceptible

Consequently, it is necessary to do no more than "merely accept * * * the words of the Act" (320 U.S. at 355). Proof "that documents being sold [are] securities under the Act" may "be done by proving [that] the document itself, * * * on its face * * * [is] stock" (*ibid.*). Petitioners cite no case in this or any other court in which shares in a corporate enterprise, which have been offered to investors as "stock," have been held not to be securities under the federal securities laws.[7]

---

of the speculative abuse that 16(b) was designed to prevent. Unlike the instant case, where the offering, denominated "stock", thereby came within the literal definition of "security" in the acts, the exchange of securities in *Kern* was not denominated a "sale" within the literal language of 16(b).

Petitioners also rely on the fact that several courts of appeals have held that certain "notes" are not securities under the federal securities laws, although "any note" is defined to be a security. Yet Congress has specifically excluded certain short-term commercial notes from the definition of "security" in Section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c (a)(10). Accordingly, while a distinction exists between notes of an investment character and notes of a commercial character, decisions which ignore the line that Congress itself has drawn between the notes it intended to subject to securities regulation and those it intended to exclude are anomalous. In any vent, notes are of a more variable character than "stock." While notes may arise out of a "current transaction" that does not involve any investment element (see Section 3(a)(3) of the Securities Act, 15 U.S.C. 77c(a)(3)), the same cannot be said of "stock," which inevitably reflects an investment relationship.

[7] The only decision of this Court to which petitioners refer, in suggesting that the plain meaning of the acts should be ignored (Br. 20–21), *Tcherepnin* v. *Knight*, 389 U.S. 332, found a "security" to exist on several alternative grounds, including a literal application of the definitional terms "certificate of interest or participation in any profit-sharing agreement" and "transferable share." See 389 U.S. at 339–340.

Furthermore, "[i]n the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." *Joiner, supra,* 320 U.S. at 353. Investors who are encouraged to "invest" in what are alleged to be "stocks" may reasonably assume that they are purchasing a security. Here, as in *Joiner, supra,* "other language in the advertising literature emphasized the character of the purchase as an investment and as a participation in an interprise." *Id.* at 346. Petitioners' Information Bulletin expressly "invite[d] offers for shares of [Riverbay's] capital stock" (178a, 196a). Petitioners' sales literature repeatedly emphasized the "investment" or "equity investment" nature of the offering, the "shares" of "stock" being made available, and the corporate form of the enterprise in which shareholders hold voting rights. (See, *e.g.*, 162a, 170–171a.)[8]

---

[8] New York law expressly provides that the offer of a share in a cooperative housing corporation is the offer of a "security" subject to New York Blue Sky laws (N.Y. Gen. Bus. Law §§ 352–359 (McKinney 1968 ed., Supp. 1974)). The Blue Sky laws were specifically amended in 1966 to require that the stock of cooperatives formed pursuant to New York State's Private Housing Finance Law, such as that offered by Riverbay, be registered with the State Attorney General (N.Y. Gen. Bus. Law 352-e.)

While the status of Riverbay stock as a "security" under the law of the state of its incorporation and where it conducts its business does not determine its status under the federal securities laws, the treatment of an interest as a security under state law is relevant to a determination of its character under federal law. See *Securities and Exchange Commission* v. *United Benefit Life Insurance Company*, 387 U.S. 202, 211–212. Moreover, the legislative history of the federal securities laws suggests that Con-

Finally, as explained in the next section, the policy underlying the federal securities laws confirms that for the purpose of those laws Riverbay's "stock" should be treated as what it purports to be—a security.

B. ECONOMIC REALITY INDICATES THAT THE SHAREHOLDERS' INVESTMENT IN RIVERBAY IS A SECURITY—THEY HAVE ENTRUSTED THEIR CAPITAL TO THE MANAGEMENT OF OTHERS AS A RESULT OF ECONOMIC INDUCEMENTS

As this Court has repeatedly stated, the federal securities laws, which were "enacted for the purpose of avoiding frauds," must be construed "not technically, and restrictively, but flexibly to effectuate [their]

---

gress intended that there be a substantial relationship between the coverage of the federal regulatory scheme and the state regulation of securities. Congress at least intended that securities as defined by state law also be deemed securities under federal law. See H. Rep. No. 85, 73d Cong., 1st Sess. 10, 27–28. S. Rep. No. 47, 73d Cong., 1st Sess. 2, 4; Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 4314, 73d Cong., 1st Sess. 29. Cf., *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298.

In view of the status of Riverbay's stock as a security under New York law, the case for applying the federal securities laws is stronger than in prior decisions of this Court in which the offerings were deemed to be securities even though under state law their status as securities was, at best, doubtful. In *Joiner*, *supra*, the defendants were able to assert, quite reasonably, that under applicable state law the interests sold were essentially real estate. 320 U.S. at 352. In *Securities and Exchange Commission* v. *W. J. Howey Co.*, 151 F. 2d 714, 715 (C.A. 5), reversed, 328 U.S. 293, the defendants also had asserted that only real estate was involved. And "the contract" held to be a security in *Securities and Exchange Commission* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, "was one of insurance under state law." *Securities and Exchange Commission* v. *United Benefit Life Insurance Company*, 387 U.S. 202, 210.

remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U.S. 180, 195; *Tcherepnin* v. *Knight*, 389 U.S. 332, 336. In using the term "security" in the securities acts, "Congress did not intend to adopt a narrow or restrictive concept * * *." *Tcherepnin* v. *Knight*, *supra*, 389 U.S. at 338. Rather, the term was meant to embody a "flexible * * * principle, * * * capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits."[9] *Securities and Exchange Commission* v. *W. J. Howey*, 328 U.S. 293, 299.

---

[9] The legislative history of the Securities Act and the Securities Exchange Act fully supports this broad approach. The ultimate objective of the Securities Act, as the House Committee on Interstate and Foreign Commerce observed, was that "persons * * * who sponsor the investment of other people's money should be held up to the high standards of trusteeship" (H. Rep. No. 85, 73d Cong., 1st Sess. 2, 3.) Similarly, the Senate Committee on Banking and Currency noted that the purpose of the law was to inform the investor "of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation" (S. Rep. No. 47, 73d Cong., 1st Sess. 1).

In enacting the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, Congress recognized that "[s]peculation, manipulation, * * * investors' ignorance and disregard of trust relationships by those whom the law should regard as fiduciaries" were "all a single seamless web" (H. Rep. No. 1383, 73d Cong., 2d Sess. 2, 6), and that the Securities Exchange Act's remedial provisions would have to be equal to the problem. "No one of these evils can be isolated for cure of itself alone" (*id.* at 6). The House Committee appraised the function of the Securities Exchange Act as an undertaking to advance the law by a "constant extension of the legal conception of a fiduciary relationship—a

Accordingly, "in searching for the meaning and scope of the word 'security' * * *, the emphasis should be on economic reality." *Tcherepnin* v. *Knight, supra,* 389 U.S. at 336. And "[t]he basic economic reality of a security transaction" is "the subjection of the investor's money to the risk of an enterprise over which he exercises no managerial control * * *." *Securities and Exchange Commission* v. *Glenn W. Turner Enterprises, Inc.,* 348 F. Supp. 766, 773 (D. Ore.), affirmed, 474 F. 2d 476 (C.A. 9), certiorari denied, 414 U.S. 821.

Thus, in *Joiner, supra,* leases of land were held to be securities because leaseholders had purchased them in the expectation that their money would be used to finance the drilling of an oil well on adjacent acreage over which investors had no control. Similarly, in *Howey, supra,* deeds to parcels of land in a citrus grove were held to be securities because "[t]he investors provide[d] the capital and share[d] in the earnings and profits [of the citrus grove]; the promoters manage[d], control[led] and operate[d] the enterprise." 328 U.S. at 300. And in *Variable Annuity, supra,* 359 U.S. at 71, insurance annuity contracts were held to be securities because they "place[d] all the investment risks on the annuitant, none on the [insurance] company" that managed the annuitants' investments and determined investment policy.

In the instant case, Riverbay stock represents an investment in a corporate enterprise over which

guarantee of 'straight shooting'". *Id.* at 5. Thus, the Securities Exchange Act "necessarily covers a wide field." *Id.* at 6.

investors exercise no direct control. Petitioners solicited and obtained $32,803,200 from 15,372 investors who together purchased 1,312,128 shares of Riverbay common stock. These funds were then devoted to Riverbay's limited profit cooperative housing development. The success of the venture is dependent upon the skill and efforts of the Riverbay management.

The Riverbay Corporation, through which petitioners operate, has the same powers as conventional business corporations. It can execute contracts, sue and be sued, acquire real and personal property, and sell, assign, or mortgage its properties.[10] The corporation may engage in certain commercial income-producing activities, such as the leasing of "any of the lands, buildings, structures or facilities embraced" within its property and the "invest[ing of] any funds held in reserves or sinking funds, or any funds not required for immediate disbursement in property or securities in which savings banks may legally invest funds subject to their control."[11] Pursuant to New York's Private Housing Finance Law, any surplus income is to be distributed in a cumulative dividend of six percent on outstanding stock, which may have the effect of reducing the monthly carrying charges that shareholders are obliged to pay in connection with the occupancy of their apartments.[12]

The operation of the corporation is under the control of a board of directors, elected by the shareholders (171a). The corporation can be voluntarily

[10] N.Y. Private Housing Finance Law § 17 (a), (j), and (b).
[11] N.Y. Private Housing Finance Law § 17 (c) and (i).
[12] N.Y. Private Housing Finance Law § 28(2).

dissolved after a certain number of years if all obligations have been paid, in which case "title to the project may be conveyed in fee to the owner or owners of its capital stock."[13] Investors bear the risk that the corporation may go bankrupt,[14] or that its management may, through poor administration, impair the value of their investments. On the other hand, any surplus income is to be distributed to the shareholders in the form of a rent rebate (162a). The surplus income may derive in part from the leasing of retail establishments, office space, parking and other commercial enterprises on the premises (P.A. 16).

In addition, significant economic inducements were held out to the purchasers of Riverbay shares. Here, thousands of low income persons, many apparently relying on fixed incomes,[15] were induced to invest their funds in Riverbay stock by promises that they would thereby enjoy at least three sorts of economic benefit: (a) they would obtain decent housing at a low price, as a result of a low-interest state-financed mortgage and a local real property tax exemption, thereby saving the difference between the cost of the cooperative housing to which their stock entitled them and the average cost of comparable housing;[16] (b) they would

[13] N.Y. Private Housing Finance Law § 35.

[14] As the court of appeals reasoned in this case, "if the corporation [Riverbay] went bankrupt, the shareholders would have sustained a loss in the amount of their investment" (P.A. 18).

[15] Preference at Riverbay is required to be given to the aged, the handicapped and veterans. N.Y. Private Housing Finance Law § 31 (7) and (8).

[16] The Information Bulletin stressed that among the "Advantages of Cooperative Housing" is that "it is a way to obtain decent housing at a reasonable price" (166a).

save taxes by being able to deduct their pro rata share of interest and real estate taxes paid by Riverbay:[17] and (c) their carrying charges for housing would be reduced by any surplus in Riverbay's yearly income (including income derived from commercial tenants).[18]

Contrary to petitioners' contention that "profit" in some narrow accounting sense is required, an investment contract type of security may exist where investors are motivated by any significant economic inducement. The lure of reductions in taxes and costs—such as those that were promised the investors in the instant case—may be as strong an inducement to invest as the hope of direct monetary gain, and one as likely to mislead an innocent investor. It is immaterial whether the economic inducement is in the form of cash payments or, as here, reduced carrying charges

[17] The Information Bulletin also stated:

"Tax Benefits * * * The present laws and regulations entitle tenant-stockholders of cooperative housing corporations to deduct from their gross income for Federal and New York State income tax purposes their proportionate share of real estate taxes and interest paid by such cooperative corporations. The actual tax saving to an individual would depend upon the respective taxpayer's income tax bracket" (175a).

[18] The Information Bulletin also stated:

"If there should be a surplus of income over expenses at the end of the year, the Board of Directors, after providing for adequate reserves, may return this surplus, or part of it, to the cooperators in the form of a rent rebate" (162a).

As the court of appeals noted, the surplus income may derive in part from "the leasing of retail establishments, office space, parking and other commercial enterprises on the premises" (P.A. 16). Retail stores allegedly pay approximately $1,106,000 in rent to Riverbay; an additional $667,000 is derived annually from the rental of office space and coin operated washing machines; and $2.5 million is derived from parking fees paid by tenants and others (P.A. 16).

and tax advantages.[19] "The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae." *Howey, supra,* 328 U.S. at 301.[20]

Nor does the fact that investors directly enjoy the housing to which their stock entitles them diminish the investment character of the transaction. In applying the securities acts, "the courts have not been guided by the nature of the assets back of a particular document or offering." *Joiner, supra,* 320 U.S. at 352. If the offering otherwise constitutes a security, "it is imma-

[19] "A saving of expense which would otherwise necessarily be incurred is also a profit to the person benefited. If [a medical services corporation] renders to its * * * members * * * a service at a cost lower than that which would otherwise be paid for such service, the * * * operations result in a profit to its members." *State ex rel. Troy* v. *Lumbermen's Clinic*, 186 Wash. 384, 394–395, 58 P. 2d 812, 816 (Sup. Ct.). Tax sheltered investments have been deemed "securities" (*El Khadem* v. *Equity Securities Corporation*, 494 F. 2d 1224 (C.A. 9), certiorari denied, October 21, 1974, No. 74–46), as have promises of employment (*Davenport* v. *United States*, 260 F. 2d 591 (C.A. 9), certiorari denied, 359 U.S. 909).

[20] Thus, *Howey* cannot be read to require a literal monetary "profit" as one indicia of an investment contract. "The admitted salutary purposes of the Acts can only be safeguarded by a functional approach to the *Howey* test." *Securities and Exchange Commission* v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473, 480 (C.A. 5); see also *Securities and Exchange Commission* v. *Glenn W. Turner Enterprises, Inc.*, 474 F. 2d 476, 482 (C.A. 9), certiorari denied, 414 U.S. 821; *Lino* v. *City Investing Co.*, 487 F. 2d 689, 692–693 (C.A. 3); *Miller* v. *Central Chinchilla Group, Inc.*, 494 F. 2d 414, 416–417 (C.A. 8); *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P. 2d 906 (Sup. Ct.); *State Commissioner of Securities* v. *Hawaii Market Center, Inc.*, 52 Ha. 642, 485 P. 2d 105, 108 (Sup. Ct.).

terial * * * whether there is a sale of property with or without intrinsic value." *Howey, supra,* 328 U.S. at 301. Thus this Court has held that interests in real estate constitute "securities" where their value depends in part on the seller's undertaking to drill an oil well on contiguous land (*Joiner, supra*), or to cultivate, harvest and market a citrus crop thereon (*Howey, supra*).

This Court has also recognized that, although a contract taken as a whole might appear to involve something quite different from a security, the "entirely distinct promises * * * included in the contract * * *" must be independently assessed. On that basis, the Court held that a "separable portion of the contract" might be found to be a security as defined in the federal securities laws. *Securities and Exchange Commission* v. *United Benefit Life Insurance Company,* 387 U.S. 202, 206–209.

II

APPLICATION OF THE FEDERAL SECURITIES LAWS TO STOCK ISSUED BY STATE-SPONSORED HOUSING COOPERATIVES IS NOT BARRED BY OTHER STATE OR FEDERAL REGULATORY SCHEMES

Contrary to petitioners' contentions, the fact that Riverbay is under the general supervision of the State of New York through its Housing Agency does not remove it from the federal securities laws, nor is the federal interest in protecting investors from allegedly fraudulent misrepresentations in the sale of Riverbay

stock inconsistent with effective state regulation of the limited profit housing industry.[21]

While in certain limited cases the availability of an exemption from the registration requirements of the Securities Act or Securities Exchange Act may turn upon whether the particular organization offering securities is supervised and examined by state or federal authorities,[22] such securities are not thereby exempt from the federal securities laws. Indeed, the securities acts were intended in part to overcome the ineffectiveness of state regulation.[23] "Concurrent regulation * * * was contemplated by the Acts as a quite generally prevailing matter. Nor is it rational to assume that Congress thought that *any* business whatsoever regulated by a specific class of officials * * * would be for that reason so perfectly conducted and regulated that all the protections of the Federal Acts

[21] See *Securities and Exchange Commission* v. *National Securities*, 393 U.S. 453, 463 ("The paramount federal interest in protecting shareholders is * * * perfectly compatible with the paramount state interest in protecting [insurance] policyholders").

[22] See, Section 3(a)(5) of the Securities Act, 15 U.S.C. 77c (a)(5), and Section 12(g)(2)(C) of the Securities Exchange Act, 15 U.S.C. 78*l*(g)(2)(C).

[23] In enacting the Securities Act, Congress specifically decided not to exempt state-regulated securities from federal jurisdiction, stating:

"The exemptions do not include the securities of public utilities and others more or less supervised by the respective State blue sky commissions. * * * State laws have failed to meet the present situation in the sale of utility and other securities in interstate commerce, with resultant loss to our people of billions of dollars" (S. Rep. No. 47, 73d Cong., 1st Sess. 4).

would be unnecessary," *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company, supra*, 359 U.S. at 75 (Brennan, J., concurring, emphasis in the original).

Application of the antifraud provisions of the federal securities acts to the investment aspects of limited profit cooperative housing is not inconsistent with other federal regulatory schemes that may govern non-investment aspects of the same transaction. The Interstate Land Sales Full Disclosure Act, as amended, 15 U.S.C. 1701–1720, cited by petitioners, was intended to govern the interstate sale or lease of certain underdeveloped land, as distinct from investment aspects of land sales to which the securities laws apply.[24] See, *e.g.*, *Howey, supra; Joiner, supra.* The Real Estate Settlement Procedures Act of 1974, Pub. L. 93–533, 88 Stat. 1724–1731, was intended to aid individuals in closing federally-related mortgage transactions, rather than to protect them from fraudulent misrepresentations in the sale of stock. And Section 821 of the Housing and Community Development Act of 1974, Pub. L. 93–383, 88 Stat. 740, also cited

[24] At the time the Act was under consideration, the Commission expressly disclaimed expertise in transactions solely involving the sale of land. In testifying before the Senate Subcommittee on Securities of the Committee on Banking and Currency, the Commission's then Chairman, Manuel F. Cohen, distinguished packaged investment interests coupled with land sales (to which the securities acts apply) as, for example, the citrus growing scheme involved in *Securities and Exchange Commission* v. *W. J. Howey Co.*, from pure real estate sales. Chairman Cohen also noted that the Commission had had some experience in real estate matters arising from so-called real

by petitioners, did not "add to or change in any way laws affecting * * * cooperative construction, sales, or ownership." [25]

III

APPLICATION OF THE FEDERAL SECURITIES LAWS WILL NOT IMPEDE THE PUBLIC HOUSING INDUSTRY NOR SERIOUSLY INTERFERE WITH COMMERCIAL COOPERATIVE VENTURES

Contrary to petitioners' contentions, there is no reason to assume that application of the federal securities laws will impede the housing industry nor seriously interfere with commercial cooperative ventures.

The registration requirements of the securities acts, while hardly burdensome,[26] are generally inapplicable to petitioners' type of operation. Section 3(a)(11) of the Securities Act, 15 U.S.C. 77c(a)(11), exempts from that Act's registration requirements securities offered and sold solely to residents of the state where the issuer is incorporated or resident and doing business. This exemption would frequently be available for state-sponsored housing developments, since such developments are intended primarily, if not exclusively, for the benefit of the state's own citizens. In-

estate investment trusts and other entities of that character. The Chairman pointed out that several other agencies, including the Bureau of Land Management in the Department of the Interior and the Housing and Home Finance Agency in the Department of Housing and Urban Development, were far more experienced than the Commission in dealing with the real estate market and in the valuation of land and subdivisions. (Hearings before a Subcommittee of the Senate Committee on Banking and Currency, on S. 2672, 89th Cong., 2d Sess. 84, 89–91.)

[25] Statement of Rep. Rosenthal, who introduced the legislation, 120 Cong. Rec. H5371 (daily ed., June 20, 1974).

[26] Even should no exemption be available from the registration and prospectus requirements, the costs of registration would not have a material impact upon the costs of the project

deed, in the case at bar, the sales literature reflects that the offer was being extended only to residents of the State of New York (170a). Moreover, any security issued or guaranteed by any state or political subdivision thereof is exempted from the registration requirements of the Securities Act as well as from various provisions of the Securities Exchange Act.[27]

Finally, Congress has explicitly provided that securities issued by a mutual or cooperative organization that provides a commodity or service for the benefit of its members are exempt from the registration requirements of Section 12(g) of the Securities Exchange Act, so long as "no dividends are payable to the holder of the security." [28]

as a whole, particularly with respect to massive ventures such as the project in the instant case. Petitioners do not suggest that there is anything inherent in the cooperative housing business which would make registration especially onerous, or interfere to any greater extent than with normal commercial ventures which must register their securities offerings with the Commission.

[27] Section 3(a)(2) of the Securities Act, 15 U.S.C. 77c(a)(2); Section 3(a)(12) of the Securities Exchange Act, 15 U.S.C. 78c(a)(12). A state therefore might be able to remove limited-income housing companies from the necessity of compliance with the registration provisions of the federal securities laws by guaranteeing the securities issued by those companies.

[28] See Section 12(g)(2)(F), 15 U.S.C. 78*l* (g)(2)(F). This provision was enacted to exempt rural electric cooperatives from the registration requirements of Section 12(g). See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on H.R. 6789, H.R. 6793, S. 1642, 88th Cong., 1st and 2d Sess., Part II, 859–860. Since the language of the exemption also covers a venture of the type conducted by a housing cooperative, the exemption may cover cooperatives of

Furthermore, the Commission by rules has recognized that securities issued by certain cooperative housing developments do not necessarily involve the same quality of investment risk as other forms of securities and has accordingly afforded appropriate exemptions. Commission Rule 235, 17 C.F.R. 230.235, for example, exempts the stock of certain cooperative housing corporations from the registration provisions of the Securities Act.[29] The Commission has also ex-

---

that character as well. It is uncertain whether Riverbay is entitled to this exemption, however, since, as we have seen, a limited profit housing company may lawfully pay dividends, and the absence of dividends is a condition of the exemption.

In addition to the foregoing categories of exemption, the exemption in Section 3(a)(4) of the Securities Act, 15 U.S.C. 77c(a)(4), to issuers organized and operated exclusively for charitable or benevolent purposes and not for pecuniary profit, might be available to non-profit cooperatives, provided that "no part of the net earnings * * * inures to the benefit of any person, private stockholder, or individual." A similar exemption is available from the registration requirements of Section 12(g) of the Securities Exchange Act, 15 U.S.C. 78*l*(g), in Section 12(g)(2)(D) of the Act, 15 U.S.C. 78*l*(g)(2)(D).

[29] Subject to the limitations imposed upon the Commission by Section 3(b) of the Securities Act, 15 U.S.C. 77c(b), relating to the aggregate size of an offering that the Commission might by rule exempt, the Commission by Rule 235 provided "an exemption for stock or other securities representing membership in a cooperative housing corporation where the securities are issued only in connection with the sale or lease of dwelling units in the housing project and are transferable by the purchaser only in connection with the transfer of such dwelling units" (Securities Act Release No. 4305 (December 8, 1960), 25 Fed. Reg. 12912).

The Commission's release relating to condominiums (Securities Act Release No. 5347 (January 4, 1973), 38 Fed. Reg. 1735), relied upon by petitioners, was a statement to the public and the

empted real estate brokers who sell shares of cooperative housing corporations from registering with the Commission as securities brokers under the Act.[30]

To be sure, the fact that petitioners' enterprise may be exempt from the registration requirements does not thereby exempt it from the antifraud provisions of the securities acts, or exclude its offering from the definition of a "security" in the acts. Exemptions from registration pertain to "certain types of securities and securities transactions where there is no practical need for [registration] or where the public benefits are too remote" [31] either because appropriate state and local authorities already possess adequate information about the enterprise or because the likelihood that invested funds will be misused is relatively low. But the need to protect innocent investors from being misled turns upon different considerations about the quality and amount of information necessary to en-

---

real estate industry that offerings of real estate, especially resort real estate, may, under some circumstances, constitute securities. The release was not intended to set forth an all-encompassing standard for real estate of every description, and that release is no way involved under the circumstances of this case.

Nor can the "No Action" letter to which petitioners refer be taken as a statement of general policy. Because such letters represent only the views of the staff, and then only with respect to an enforcement posture in a particular case, they have no precedential value. In any event, the views expressed by the Commission staff do not necessarily reflect the views of the Commision, 17 C.F.R. 202.1(d).

[30] Rule 15a-2, 17 C.F.R. 240.15a-2. See also Securities Exchange Act Release No. 3963 (June 10, 1947), 13 Fed. Reg. 8204.

[31] H. Rep. No. 85, 73d Cong., 1st Sess. 5.

able members of the public to make informed decisions about where they will invest their savings.

Compliance with the antifraud provisions of the securities acts would not, however, disrupt the limited profit cooperative housing industry. To the contrary, it should strengthen it by helping to assure that low income persons who invest their limited savings in cooperative housing enterprises are provided with truthful and complete information concerning the kind of obligations they may incur under their investment contracts and the benefits they may reasonably expect to receive.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
ROBERT B. REICH,
Assistant to the Solicitor General.
LAWRENCE E. NERHEIM,
General Counsel,
PAUL GONSON,
Associate General Counsel,
RICHARD E. NATHAN,
Assistant General Counsel,
Securities and Exchange Commission.[32]

APRIL 1975.

---

[32] Melvin A. Brosterman, Law Clerk in the Office of the General Counsel, assisted in the preparation of this brief. He is presently awaiting admission to the Bar of the State of New York.

U.S. GOVERNMENT PRINTING OFFICE: 1975

see

7-4

6-47